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ARTICLE

MULTIPLE TORTFEASOR LIABILITY IN PRODUCTS LIABILITY SUITS

John W. Wade

COMMENT

FAIR APPORTIONMENT OF FAULT AMONG JOINT TORTFEASORS — A MISSISSIPPI PERSPECTIVE

1985 MISSISSIPPI SUPREME COURT REVIEW

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MULTIPLE TORTFEASOR LIABILITY IN PRODUCTS LIABILITY SUITS

*John W. Wade**

A definition of the scope of my topic, as I envision it, is the most suitable way for me to begin. I am assuming a situation in which one person (the "plaintiff" or injured party) has been physically hurt by the conduct of two or more other parties and one of the causes of the injury was a defective product. We are concerned here with the relationship between the tortfeasors ("defendants") and how financial responsibility for the plaintiff's injury is to be distributed among them, either in the original action brought by the plaintiff or actions among the defendants.

Today that subject is a very amorphous one, extremely hard to organize, and, because of the extensive and wide variances in the law in the individual states, virtually impossible to depict in meaningful generalizations. By intensive study of the statutes and decisions of a particular state, one could offer a fairly precise and accurate description of the status of the law in it, but my assignment is to discuss the topic in general—to provide some historical background, some generalized description of the different positions found in the states, and some discussion of what I regard as the best and fairest solution for the more important issues on which there is substantial disagreement.

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This article is based on a talk given at the 1984 National Conference on Products Liability Law. Although somewhat revised, it retains the informal locution of an oral treatment. Footnotes have been added. Appreciation is expressed to the National Practice Institute of Minneapolis, for graciously granting permission to use the material and to Rick Culp of the *Mississippi Law Journal* for industrious work in preparing the footnotes.

I. REMEDIES

At traditional common law an action for contribution was not available to a joint tortfeasor and there was no third-party practice.[1] But indemnity was available in a limited number of situations.[2]

1. *Indemnity.* Under this remedy one tortfeasor who has paid for the plaintiff's injury might recover this full payment from another tortfeasor.[3] The remedy of indemnity and the doc-

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Merryweather v. Nixan (1799 K.B.) 8 T.R. 186, 101 Eng. Reprint 1337. In *Merryweather*, Lord Kenyon denied contribution among intentional tortfeasors. A judgment was rendered against two defendants, but recovery levied solely against the one tortfeasor who then unsuccessfully sought contribution. *Id. See generally*, Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 425-30 (1937)(discussion of contribution); Reath, *Contribution Between Persons Jointly Charged for Negligence*—Merryweather v. Nixan, 12 HARV. L. REV. 176, 177-78 (1898)(history of common-law doctrine); Note, *Torts—Joint Tortfeasors—Liability and Contribution for Indivisible Injury*, 45 TENN. L. REV. 129, 130-31 (1977)(discussion of application of the common-law rule in American courts); Annot., 60 A.L.R.2d 1366 (1958)(common-law rule as to contribution).

[2] *See, e.g.*, Alabama Great S.R.R. Co. v. Allied Chem. Corp., 501 F.2d 94, 98 (5th Cir. 1974), *aff'd*, 509 F.2d 539 (5th Cir. 1975)(indemnity allowed as between tortfeasors who are not in pari delicto); Canadian Indem. Co. v. United States Fidelity & Guar. Co., 213 F.2d 658, 660 (9th Cir. 1954)(employer held vicariously liable for tort of servant was entitled to reimbursement by servant of funds paid to plaintiff); McClish v. Niagara Mach. & Tool Works, 266 F. Supp. 987, 991 (S.D. Ind. 1967)(indemnity allowed in favor of party whose liability to third party is strictly constructive or derivative); Colt Indus. Operating Corp. v. Coleman, 246 Ga. 559, 272 S.E.2d 251, 253 (1980)(tortfeasor guilty of passive negligence may seek indemnity against party whose active negligence was proximate cause of injury); Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368, 371 (1951)(purported indemnitee who is secondarily liable has right of indemnity against party deemed primarily liable).

For a thorough discussion of indemnity between or among tortfeasors, see 1 S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 3.26 (1983). *See generally* KEETON, DOBBS, KEETON & OWEN, PROSSER AND KEETON ON TORTS § 51 (1984); RESTATEMENT (SECOND) OF TORTS §§ 886A (contribution) and 886B (indemnity)(1977); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932); Sales, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L.J. 323 (1980); Sherk, *Common Law Indemnity Among Joint Tortfeasors*, 7 ARIZ. L. REV., 59 (1965).

[3] *See* Bush v. City of Laurel, 215 So. 2d 256, 259-60 (Miss. 1968)(discussion of obligations to indemnity); Stephenson v. McClure, 606 S.W.2d 208, 210 (Mo. App. 1980)(more appropriate to use term indemnity in referring to 100% reimbursement); International Harvester Co. v. Zavala, 623 S.W.2d 699, 702 (Tex. Civ. App. 1981)(indemnity is payment of all of plaintiff's damage by one tortfeasor to another who has already paid amount to plaintiff, and results in shifting of entire burden of loss).

trine of contributory negligence[4] were very similar in the sense that they illustrated the common law policy of all-or-nothing.[5] The common law did not countenance the dividing or apportioning of responsibility, as in contribution or comparative negligence.[6] It insisted on a yes-or-no answer. Relief was granted or not granted. If granted, it was full relief, as in indemnity or last clear chance.[7] If it was not granted, there was no relief at all. All or nothing!

How did the court decide when indemnity should be granted? Well, a number of tests were offered,[8] but basically the determination depended on which of the two parties the court felt should bear all of the loss, leaving the other one exculpated. If there was fault on the part of both parties, indemnity was not ordinarily available.[9] There are some situations in which it is

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[4] The common-law contributory negligence doctrine was developed from the 1809 case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). The English abandoned contributory negligence and adopted comparative negligence some 40 years ago. *See* Law Reform Act, 1945, 8 & 9 Geo. 6, ch. 28. The first American case embracing the doctrine is thought to be Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824).

[5] *See* Wade, *Comment on* Maki v. Frelk—*Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 VAND. L. REV. 889, 938 (1968)(discussing the all-or-nothing common-law approach); *see also* S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 3.28 (1983)(same).

[6] For a helpful background study of comparative negligence, see generally V. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986) (general discussion with texts of various statutes).

[7] The rationale for the holding in Davies v. Mann, 10 M. & W. 547, 152 Eng. Rep. 583 (1842), came to be known as the doctrine of last clear chance. For a full examination of this doctrine, see Fuller v. Illinois R.R., 100 Miss. 705, 56 So. 783, 785-86 (1911).

[8] THE RESTATEMENT OF RESTITUTION § 76 (1937) provides that indemnity is available when one person "has discharged a duty which is owed by him but which, as between him and another, should have been discharged by the other." The RESTATEMENT (SECOND) OF TORTS § 886B (1977), however, makes indemnity conditional upon whether "the other would be unjustly enriched at his expense by the discharge of the liability. *See also* Bush v. City of Laurel, 215 So. 2d 256, 259 (Miss. 1968)(Mississippi Supreme Court holds indemnity available when one person is required to pay money that another person in all fairness should pay).

[9] *See* Reid v. United States, 558 F. Supp. 686, 688 (N.D. Miss. 1983)(when each is charged with active or affirmative wrongdoing, neither may obtain indemnity); DeCuers v. Crane Co., 40 So. 2d 61, 71 (La. App. 1949)(no action for indemnity between two or more parties acting in concert). *But see*, Auston v. Fulton Ins. Co., 498 P.2d 702, 705 (Alaska 1972)(indicating indemnity recoverable by one of the multiple tortfeasors against the other); Winn-Dixie Stores, Inc. v. Fellows, 153 So. 2d 45, 50 (Fla. App. 1963)(applying Florida law).

easy to reach the conclusion that indemnity should be granted. If one person was not personally at fault but was only vicariously liable for the fault of the other, he would be entitled to indemnity.[10] So also is the situation in which a retailer is held liable in implied warranty to a buyer when he was not negligent in any respect. He might obtain indemnity from the manufacturer, who was responsible for the dangerous condition of the product.[11] Other bases for granting indemnity have also developed, and in the absence of contribution some courts began to talk of active and passive negligence[12] or primary and secondary liability.[13] The various bases are listed and analyzed in section 886B of the RESTATEMENT (SECOND) OF TORTS.[14] Most of them

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[10] In this situation, indemnity is granted to the party vicariously liable. *See* Granquist v. Crystal Springs Lumber Co., 190 Miss. 572, 581-84, 1 So. 2d 216, 218-19 (1941)(agent, through whose sole wrong principal has been obliged to make compensation to third person, is liable to principal); Maryland Casualty Co. v. Frederick Co., 53 N.E.2d 795, 799 (Ohio 1944)(implied contract of indemnity in favor of party secondarily liable); *see also* Annot., 53 A.L.R.3d 631 (1957)(liability of employer for negligent operation of motor vehicle by automobile salesman).

[11] The imposition of final liability upon the manufacturer is based on the theory that the bearers of the loss should be "those who have created the risk and reaped the profit, by placing the product in the stream of commerce." Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182, 186 (1965); *see* Newark v. Gimbels, Inc., 54 N.J. 585, 258 A.2d 697, 705 (1969)(retailer of hair treatment solution which proved to be caustic, entitled to indemnity from manufacturer); DiGregorio v. Champlain Valley Fruit Co., 127 Vt. 562, 255 A.2d 183, 185 (1969)(retailer of banana which had glass thermometer inserted and caused injury to third party entitled to contribution from Fruit Company).

[12] *See* Lundy v. Whiting Corp., 93 Ill. App. 3d 244, 417 N.E.2d 154, 165 (1978)(because of qualitative difference between two parties' negligence, passively negligent party permitted to shift liability); Sweeny v. Pease, 294 N.W.2d 819, 823 (Iowa 1980)(active/passive distinction defined); Home Ins. Co. of New York v. Atlas Tank Mfg. Co., 230 So. 2d 549, 551 (Miss. 1970)(claimant seeking noncontractual implied indemnity must not have participated actively or affirmatively in wrong).

[13] *See* Mauro v. McCrindle, 70 A.D.2d 77, 419 N.Y.S.2d 710, 712-14 (App. Div. 2d 1979) (stressing differences between primary and secondary liability), *aff'd*, 52 N.Y.2d 719, 417 N.E.2d 576, 436 N.Y.S.2d 273 (1980); Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368, 370 (1951)(right of indemnity rests on difference between primary and secondary liability of two persons, each made responsible to injured party).

The "active/passive" distinction has drawn considerable criticism as well as outright rejection. *See* American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 594, 578 P.2d 899, 909, 146 Cal. Rptr. 182, 192 (1978)(distinctions criticized as being artificial and lacking the objective criteria desirable for predictability in the law); General Motors Corp. v. Simmons, 558 S.W.2d 855, 860 (Tex. 1977)(standard distinguishing active and passive negligence held "unsound").

[14] Section 886B of the RESTATEMENT (SECOND) OF TORTS (1977), provides:

have no particular relevance to product liability cases.

2. *Contribution.* The old common-law rule of no contribution among tortfeasors has been changed today in the great majority of states, by judicial or legislative action. Some of the state courts adopted contribution on the ground that the early English cases had involved intentional torts and had been misinterpreted to apply to negligence as well.[15] Others judicially adopted contribution because they regarded it as the fairest rule to apply.[16] And then there are statutes in a large number of states.[17] The combination of the two includes the great majority of the states, and section 886A of the RESTATEMENT (SECOND) OF TORTS now provides that contribution is the general rule.[18]

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(1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.

(2) Instances in which indemnity is granted under this principle include the following:

(a) The indemnitee was liable only vicariously for the conduct of the indemnitor;

(b) The indemnitee acted pursuant to directions of the indemnitor and reasonably believed the directions to be lawful;

(c) The indemnitee was induced to act by a misrepresentation on the part of the indemnitor, upon which he justifiably relied;

(d) The indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;

(e) The indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;

(f) The indemnitor was under a duty to the indemnitee to protect him against the liability to the third person.

Id.

[15] *See* Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437, 438-40 (1977), *cert. denied*, 436 U.S. 946 (1978); *see also* Reath, *supra* note 1, at 177-78 (1898)(noting the common law's limited meaning of the word "tort"—a willful or intentional wrong).

[16] *See* Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23, 26-29 (1956)(rule permitting contribution has "firmer foundation").

[17] *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2925a (West 1968); MISS. CODE ANN. § 85-5-5 (1972); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).

[18] The RESTATEMENT (SECOND) OF TORTS § 886A (1977), provides in full:

(1) Except as stated in Subsections (2), (3) and (4), when two or more persons become liable in tort to the same person for the same harm, there is a right of

A number of the statutes, particularly the earlier ones, impose very unfortunate restrictions on the granting of contribution. For example, a good number of the statutes require that there be a joint judgment obtained against the two defendants.[19] That often does not happen, especially if there is no adequate third-party practice[20] allowing a defendant to bring in other defendants and arrange for a joint judgment. Beginning with a decision in New York,[21] several states have judicially created a system bypassing the statutory restriction. Since indemnity is a common-law remedy it is within the control of the courts, they say. It represents an equitable principle and can be made more equitable by not imposing the all-or-nothing policy but instead applying an apportionment based on the relative fault of the parties.[22] Although this is called equitable indemnity, it is actu-

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contribution among them, even though judgment has not been recovered against all or any of them.

(2) The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tortfeasor can be required to make contribution beyond his own equitable share of the liability.

(3) There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.

(4) When one tortfeasor has a right of indemnity against another, neither of them has a right of contribution against the other.

Id.

[19] *See* MISS. CODE ANN. § 85-5-5 (1972); MO. ANN. STAT. § 537.060 (Vernon 1949); W. VA. CODE § 55-7-13 (1980).

[20] Of course the right of a defendant in an action to implead a joint tortfeasor for the purpose of asserting a right of contribution depends upon the existence of two statutes, a substantive one bestowing the right of contribution against a joint tortfeasor, and a procedural one permitting the defendant to implead a third party who is or may be liable to the original defendant should a judgment be rendered against him. Several states do not provide this procedural statute. *See, e.g.*, Alseike v. Miller, 196 Kan. 547, 412 P.2d 1007, 1010-13 (1966)(Kansas defendant has no right to bring in joint tortfeasor not made party by plaintiff); Simon v. Strock, 209 S.C. 134, 39 S.E.2d 209, 211 (1946)(defendant has no right to bring in additional defendant not made party); Rouse v. Eagle Convex Glass Specialty Co., 122 W. Va. 671, 13 S.E.2d 15, 16 (1940)(defendant in tort action cannot have an alleged joint tort-feasor made a party).

[21] Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[22] Missouri P.R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 472-74 (Mo. 1978)(en banc)(advocating treatment of two concurrent tortfeasors according to their relative fault); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148-50, 282 N.E.2d 288, 291-93, 331 N.Y.S.2d 382, 386-88(1972)(recognizing situations which would justify apportionment of responsibility).

ally a form of contribution,[23] and the contribution statute has withered away as a useless appendage in those states.

One important problem in connection with contribution is deciding what should be the basis for apportionment. Some statutes and judicial decisions adopted a pro-rata allocation.[24] Under this system, each tortfeasor bears the same proportionate part, the fraction depending upon the number of tortfeasors among whom the loss is distributed.[25] The second method is to apportion responsibility among the tortfeasors according to their comparative percentages of fault.[26] The first method is simpler and easier to administer.[27] Because of this, the parties themselves may be more likely to reach a settlement on their own. But it may be somewhat arbitrary on occasion and the second

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[23] *See* Green Bus Lines, Inc. v. Consolidated Mut. Ins. Co., 74 A.D.2d 136, 426 N.Y.S.2d 981, 991 (1980); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 334 N.Y.S.2d 851, 854 (1972)(recognizing this as a doctrine of relative contribution).

[24] *See, e.g.*, McDonald v. Magruder, 28 U.S. (3 Pet.) 470, 478 (1830); Vandiver v. Pollak, 107 Ala. 547, 19 So. 180 (1895); Neenan v. Woodside Astoria Transp. Co., 261 N.Y. 159, 184 N.E. 744, 745-46 (1933); Gattegno v. The Parisian, 53 S.W.2d 1005, 1006-07 (Tex. Civ. App. 1932)(statute permitting contribution).

[25] It was presumed that all of the joint obligors benefited in equal degrees by the consideration paid by one, and thus each person was obligated to pay his proportionate share of the obligation. Hollis v. Winfree, 216 S.W.2d 625 (Tex. Civ. App. 1948).

[26] "Comparative contribution" developed in some states as a result of express legislative wording. *See* FLA. STAT. ANN. § 768.31(3)(West 1975); IDAHO CODE § 6-803(3)(1979); WYO. STAT. § 1-7.3(c)(1977).

Contribution based on comparative fault was developed in a few states by court action. *See* Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197, 203, 73 Ill. Dec. 337 (1983)(doctrine of comparative negligence is applicable in actions or claims seeking recovery under products liability or strict liability in tort theories); American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 587-88, 578 P.2d 899, 905, 146 Cal. Rptr. 180, 187-88 (1978)(comparative negligence system as basis for apportioning liability among multiple tortfeasors; leading case); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 149-151, 282 N.E.2d 288, 292-94, 331 N.Y.S.2d 382, 387-89 (1972)(same).

[27] Fleming, J.G., *Report to the Joint Committee of the California Legislature on Tort Liability*, 30 HASTINGS L.J. 1464 (1979), notes that pro rata divisions:

> [D]ispense with the need for, and costs of, any protracted inquiry into shares of fault, and aids settlements because the formula is categorically fixed by law. Secondly, its advocates contend that the formula promotes settlements in yet another way: insofar as a defendant with a low percentage of fault will settle rather than risk being found liable at a trial and incurring pro rata liability. This argument, however, seeks to make a virtue out of its potential for serious abuse, namely, as a means not for encouraging, but for extorting settlements from slightly negligent defendants.

Id. at 1485-86.

system will generally prove much fairer. It is also likely to fit in better with a system of comparative negligence. Indeed, it would supplant many of the applications of indemnity, especially when the court was talking of active and passive negligence.

This is a suitable opportunity to mention two equitable remedies that may prove helpful. The first is subrogation. If a person is required by law or by contract to pay the obligation of another, he may be subrogated to the rights of the person whom he paid and entitled to enforce them against the other in his own interest.[28] The second is exoneration.[29] A surety, signing a note as a favor to the principal obligor, may seek exoneration after the note becomes due, requiring the principal obligor to go ahead and pay the note instead of failing to pay it and thereby subjecting the surety to a possible direct suit by the payee.[30] This is preventive relief. I do not know of a case involving joint tortfeasors in which it has been sought, but the principle seems broad enough to cover this situation, too.

3. *Product Liability Suit.* This sub-title may be confusing without explanation. In referring here to a product liability suit I do not mean an action by the injured party against the manufacturer or other supplier of the product. Instead, I refer to an action by one of the tortfeasors against another—particularly by a retailer against the manufacturer. Under pertinent circumstances the retailer may sue successfully in strict liability, implied warranty or negligence. The action is not for personal injury, but for liability created against the retailer by the manufacturer's supplying a defective product. An early case illustrating this is *Mazzetti v. Armour & Co.*[31] There Armour supplied defective meat to Mazetti, a restaurant owner, who found himself liable to customers made ill by eating the defective

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[28] *See generally* McGee v. Wilson County, 574 S.W.2d 744 (Tenn. App. 1978); Greene v. Waters, 260 Wis. 40, 49 N.W.2d 919 (1951); RESTATEMENT OF RESTITUTION § 162 (1937); G. CLARK, EQUITY § 365 (1954); 4 POMEROY, EQUITY JURISPRUDENCE § 1419 (5th ed. 1941).

[29] *See, e.g.*, Woodward v. Hollis, 93 Colo. 17, 22 P.2d 862 (1933); Matthews v. Matthews, 128 Me. 465, 148 A.D. 796 (1930).

[30] *See generally* G. CLARK, EQUITY § 368 (1954); 4 POMEROY, EQUITY JURISPRUDENCE § 1417 (5th ed. 1941); RESTATEMENT OF RESTITUTION §§ 76 comment g; 81 comment (1937).

[31] 75 Wash. 622, 135 P. 633 (1913).

meat.[32] His suit against Armour was sustained.[33] This, of course, is very similar in effect to indemnity but it operates under quite different rules; and a products liability action may avoid some of the restrictions and deficiences of an action for indemnity or contribution. I leave it to you to contemplate some of the advantages that this remedy might have in appropriate circumstances. There are many of them and it is rather surprising that the remedy has not been utilized more frequently.

4. *Joinder and Allocation.* This remedy involves, not an independent action, but the utilization of certain procedural opportunities under the modern law of many states. Third-party practice[34] makes it possible for a defendant to join other persons as third-party defendants for purposes of contribution and indemnity and thus ensure that their responsibility will be established in the same action.

Under the Uniform Comparative Fault Act[35] and in some states even though joint and several liability still applies,[36] the "equitable share of the obligation" is laid down in the trial so that the parties will all know what the ultimate allocation should work out to be. Some states have abolished joint and several liability and definitively allocated proportionate liability.[37]

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[32] *Id.* at 633-34.

[33] *Id.* at 636.

[34] *See generally* Pioneer Mut. Compensation Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089, 1091 (1952)(discussing Colorado statute providing that defendant may bring in third party); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.20 (2d ed. 1977)(discussion of third-party practice, particularly Federal Rules).

[35] The Uniform Comparative Fault Act was approved by the National Conference of Commissioners on Uniform State Laws in 1977. Section 3 of the Act was amended by the National Conference in 1979. The amended text is found in 12 UNIF. LAWS ANN. 37 (1986 Pocket Part).

[36] *See* Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308, 1312, 1313 (1978)(en banc)(joint and several liability means each concurrent tortfeasor is liable for entire harm caused; injured party may sue one or all to obtain full recovery). The rule of joint and several liability grew out of the common-law concept of unity of the cause of action; that is to say that the jury could not apportion damages since there was but one injury or wrong. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 418 (1937).

[37] *See, e.g.*, Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 873-75 (1978)(adoption of comparative negligence in Kansas held to abolish common-law principles of joint liability). The Illinois Supreme Court set forth the following reasons for retaining joint liability in Coney v. J.G.L. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983):

More on the implications of that later.

5. *Vouching-in.* Section 2-607(5) of the Uniform Commercial Code provides that "[w]here the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over, . . . he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound . . . ."[38]

An obvious application of this provision is the case of a retailer who is sued by his customer-consumer and vouches-in the manufacturer (or wholesaler).[39] If the manufacturer fails to come

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(1) The feasibility of apportioning fault on a comparative basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage. In many instances, the negligence of a concurrent tortfeasor may be sufficient by itself to cause the entire loss. The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.

(2) In those instances where the plaintiff is not guilty of negligence, he would be forced to bear a portion of the loss should one of the tortfeasors prove financially unable to satisfy his share of the damages.

(3) Even in cases where a plaintiff is partially at fault, his culpability is not equivalent to that of a defendant. The plaintiff's negligence relates only to a lack of due care for his own safety while the defendant's negligence relates to a lack of due care for the safety of others; the latter is tortious, but the former is not.

(4) Elimination of joint and several liability would work a serious and unwarranted deleterious effect on the ability of an injured plaintiff to obtain adequate compensation for his injuries.

454 N.E.2d at 205; *see also* N.H. REV. STAT. ANN. § 507.7-2 (1983) and VT. STAT. ANN. tit. 12 § 1036 (Supp. 1985)(both providing that each joint tortfeasor is only liable for his proportionate share of responsibility).

[38] U.C.C. § 2-607(5) (1972). Section 2-607(5) brings into the U.C.C. the common-law doctrine of vouching. In London Guarantee & Accident Co. v. Strait Scale Co., 322 Mo. 502, 15 S.W.2d 766 (1929), the Missouri Supreme Court became the first American Court to give effect to a vouching letter regarding a breach of warranty of quality. Of course the vouching in of the seller pursuant to § 2-607(5) does not make him a party, but rather, he defends the case in the name of the buyer who vouched him in.

[39] *See, e.g.*, Safeway Stores, Inc. v. L.D. Schreiber Cheese Co., 326 F. Supp. 504, 509-10 (W.D. Mo. 1971)(wholesaler found liable to retailer for consumer claim; wholesaler having demanded that manufacturer assume defense, manufacturer precluded from chal-

in and defend and the retailer is held liable to the consumer, the finding that the product was actionable is binding on the manufacturer and his liability is clear. There are some problems, however. Courts are not in agreement on whether the retailer can recover attorney's fees as well as the amount of liability. There is also disagreement on whether he can recover attorney's fees when he defended the case and won it. Other questions arise: What is the effect of a settlement by the retailer with the consumer?[40] What if the manufacturer contends that the dangerous condition of the product was produced or exacerbated by the retailer?[41]

This vouching-in process has strong similarities to two other legal doctrines and may be influenced by development in them. The first is the equitable remedy of exoneration, which I have previously mentioned.[42] The second is the rapidly developing doctrine of collateral estoppel.[43] The combination of these three ideas may eventually develop a very satisfactory remedy for the

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lenging liability); CGM Valve Co. v. Gulfstream Steel Corp., 596 S.W.2d 161, 163-64 (Tex. Civ. App. 1980)(voucher available against manufacturer, but not when defendant settles cause rather than litigating to judgment).

[40] As noted in the previous footnote, the Texas Court of Civil Appeals has held that the vouching remedy is not available when the defendant settles the cause rather than litigating to judgment. CGM Value Co. v. Gulfstream Steel Corp., 596 S.W.2d 161, 163 (Tex. Civ. App. 1980).

[41] *See* International Harvester Co. v. TRW, Inc., 695 P.2d 1262, 1266-67 (Idaho 1985)(suggesting that truck manufacturer's installation of component parts caused plaintiffs injuries). In this case, International Harvestor met all of the requirements of U.C.C. § 2-607(5) (1972) for vouching in TRW, the manufacturers of the steering mechanism. Because International Harvester failed to obtain a special verdict from the jury establishing that the defective steering mechanism supplied by TRW in fact caused the injuries sued upon, the Idaho Supreme Court determined that a genuine issue of material fact remained as to the specific cause of plaintiff's injuries, precluding issuance of summary judgment against TRW.

[42] *See supra* note 29.

[43] Collateral estoppel is sometimes referred to as issue preclusion and is a theory which provides generally that issues that have actually been decided against a party in some previous action may be relied on by an opposing party, not a party to the prior suit. It is important, however, to inquire whether the issues presented in the current litigation are in substance the same as in the prior litigation. *See* Yarn Indus., Inc. v. Krupp Int'l, Inc., 736 F.2d 125, 128 (4th Cir. 1984)(collateral estoppel bars relitigation of issue once actually determined by prior court with jurisdiction); Island County v. Mackie, 36 Wash. App. 385, 675 P.2d 607, 611 (1984)(collateral estoppel prevents relitigation of determinative fact after party estopped has had full opportunity to present case). *See generally*, RESTATEMENT (SECOND) OF JUDGEMENTS §§ 27, 28 (1982).

problem contemplated when the vouching-in provision was incorporated in the U.C.C. And the remedy may turn out to take such adequate care of the retailer that the current agitation for passage of a statute making retailers liable only if they are negligent, will diminish.

II. Fact Patterns of Product Liability Cases

It may be helpful to identify some hypothetical fact patterns of product liability cases that raise questions of loss-distribution among the defendants. This will let you see more clearly how problems of loss distribution arise and what difference the type of pattern may have on the effect of various factors that influence the results to be reached. There are four identifiable patterns.

1. *Up the Vertical Chain.* The vertical chain here is the chain of production and distribution of a product, proceeding from the maker or supplier of a component part, through a manufacturer or assembler, through a wholesaler or middleman, through the retailer to a consumer or even to a "bystander," if he is the injured party. In these cases, the usual question is whether someone down the chain, having been held liable, is entitled to indemnity from someone higher up the chain. The typical example is that of a retailer seeking indemnity from the manufacturer. If the retailer was not at fault, indemnity is usually granted.[44] Otherwise, some form of contribution is required,[45] if that remedy is available in the state. A second example is an action by the manufacturer against the supplier of a component part.[46]

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[44] *See* Jennings v. United States, 374 F.2d 983, 987 n.7 (4th Cir. 1967)(right of indemnity recognized where negligence of indemnitee not serious); Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697, 705 (1969)(dealer has action over against manufacturer).

[45] This, however, may include the equitable or comparative indemnity situation mentioned previously and evidenced in the case of American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 578 P.2d 899, 910-11, 146 Cal. Rptr. 182, 193-94 (1978)(California Supreme Court noted automobile manufacturer-dealer situation as indicative of inequitable results achieved by application of traditional standard). *Cf.* Williams v. Steuart Motor Co., 494 F.2d 1074, 1084 (D.C. Cir. 1974)(dealer entitled to full indemnity from manufacturer despite violation of duty to inspect new vehicles; court made passive/active distinction).

[46] *See* Westric Battery Co. v. Standard Elec. Co., 522 F.2d 986, 990 (10th Cir.

2. *Down the Vertical Chain.* The same problem of indemnity can arise here, too. Suppose, for example, an automobile manufacturer supplies a car to a retailer, who is expected to "prep" it—i.e., prepare it for actual use by final checking and lubrication—but the retailer performs this function negligently, so that the car is damaged. It has been held that the manufacturer is under a nondelegable duty to see that the "prepping" is properly done, so that he is liable for the retailer's negligence.[47] Is the manufacturer entitled to indemnity, or must his relief depend on the availability of contribution?

Consider a second illustration: A lawn mower has a defective blade that did not become apparent until the customer had used the mower several times. It does become apparent on one occasion, but although the mower is clearly dangerous, the owner deliberately continues to use it to finish mowing his yard. The blade flies off and hurts a neighbor's child. If the manufacturer pays, is he entitled to indemnity against the owner of the mower?[48]

3. *No Vertical Chain Relation Involved.* An example is the best way of explaining this pattern. Suppose two cars collide and one driver is injured. The other driver was negligent in driving, and one of the two cars had a brake defect that suddenly manifested itself. What is the distribution of responsibility between the negligent driver and the manufacturer of the defective car?[49]

1975)(indemnity sought from seller of defective battery component parts); Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 338 N.E.2d 857, 861 (Ill. 1971)(liability traced back to component manufacturer).

[47] *See* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

[48] Often such a remedy is barred unless there is an express agreement of indemnity. *See* Davis v. Niagara Mach. Co., 90 Wash. 2d 342, 581 P.2d 1344, 1347-48 (1978)(punch press manufacturer could not seek indemnity from negligent employer absent express agreement of indemnity). *See generally* Annot., 28 A.L.R.3d 943 (1969)(right of manufacturer or seller to contribution or indemnity from user of product causing injury to third person).

[49] If the negligent driver is driving the defective automobile and is sued solely under a theory of negligence in the operation of the vehicle, he will likely be unable to obtain indemnity from the automobile manufacturer. Because the liability of the negligent driver does not rest on a condition for which the manufacturer is primarily responsible, indemnity will not be permitted. *See* Schuster v. Steedley, 406 S.W.2d 387, 390 (Ky. 1966)(bystander recovers for negligence of rifle owner; owner not entitled to indemnification from seller).

4. *Combination of Chain-Relation Defendants and Other Tortfeasors.* The example just given can be made more complicated by having the defect in the brake located in a component part supplied to the manufacturer by another party, by adding the city as a defendant because of a dangerous condition of the street and by other ramifications. You see how cases involving multiple defendants can become extremely complex.

III. Complicating Factors

Cases may become complex not only because of the presence of multiple defendants but also because of the application of varying legal concepts that can affect the outcome of an action against different types of defendants in differing ways. I want now to identify some of these concepts and indicate their possible effect or influence on allocation of loss responsibility.

1. *Injured Party Also at Fault.* The practically universal rule at common law was that a plaintiff's contributory negligence barred recovery[50] except in certain special situations, like last clear chance.[51] Today, the great majority of the states have adopted some form of comparative fault. The types of comparative negligence treatments, however, vary considerably.[52] Fitting

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In Southwest Miss. Elec. Power Ass'n v. Harragill, 254 Miss. 460, 182 So. 2d 220 (1966), a user of a defective truck, who was sued by an injured third party, sought indemnity from the manufacturer of the truck. The user, however, had earlier settled with the injured third party. The Mississippi Supreme Court held that since the user was not negligent the payment made in settlement was voluntary. Because the payment was voluntary, the volunteer could not recover in an action for indemnity. *Id.* at 222.

[50] *See generally supra* note 1. For an up-to-date listing of states observing comparative negligence, see Smith & Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Under Acts*, 17 IND. L. REV. 969, 969-70 n.3 (1984). This article treats in some detail some of the topics later discussed in the present article.

[51] Under the "last clear chance" rule, a plaintiff's contributory negligence does not bar recovery when the defendant had a later opportunity to avert the accident and negligently failed to take advantage of the opportunity. *See* Gasich v. Chesapeake & Ohio R. Co., 453 N.E.2d 371, 373 (Ind. App. 1983)(no attempt to swerve to avoid inevitable collision); Vernon v. Crist, 28 N.C. App. 631, 222 S.E.2d 445, 447 (1976)(doctrine inapplicable where plaintiff was leaning on vehicle driven forward without warning).

[52] There are three generally recognized forms of comparative fault or negligence. Under "pure" comparative fault as recognized in Mississippi, the plaintiff's negligence serves only to reduce the amount to which he is entitled to recover, and some recovery is allowed even if the plaintiff's negligence is greater than the defendant's. *See* MISS. CODE ANN. § 11-7-15 (1972). The initial Wisconsin statute was indicative of the second form of

existing contribution rules in with the comparative negligence rules has created serious problems. Contribution is often made on a pro-rata basis;[53] comparative negligence is normally on a percentage basis.[54] The two methods of apportionment are innately inconsistent and do not fit together satisfactorily. Modified systems of comparative negligence, providing that a plaintiff cannot recover if his negligence is greater than (or, in some states, equal to) that of the defendant, may create difficulties without an adequate solution in multiple defendant cases, unless the comparative negligence rule is held to compare the plaintiff's fault against the combined fault of all the defendants. What is urgently needed is a system that is designed to fit the two concepts together logically. This can easily be done under the pure comparative negligence system, and is carefully planned to accomplish this purpose in the Uniform Comparative Fault Act.[55]

2. *Negligence and Strict Liability in the Same Action.* The contributory negligence situation is also complicated when the suit is brought on the basis of strict products liability. How can the two types of conduct be compared to determine the proper

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comparative fault or negligence often termed "modified" comparative fault. This form is divided into two groups, one providing that the plaintiff is barred from recovery if his negligence is equal to that of the defendant, the other barring recovery if plaintiff's negligence is greater than that of the defendant. *See* WIS. STAT. § 895.045 (1969). Finally, a few states follow the "slight negligence" form, which provides that the plaintiff can recover only if his negligence is slight in comparison to the defendant's. *See* S.D. COMP. LAWS ANN. § 20-9-2 (1967).

Detailed treatments of comparative fault are found in three treatises: V. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986); H. WOODS, COMPARATIVE FAULT (1978); and MATTHEW BENDER (publisher), COMPARATIVE NEGLIGENCE: LAW AND PRACTICE (3 vols. 1985). All are kept up to date with pocket parts or loose leaves.

[53] *See, e.g.*, UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2, 12 U.L.A. 87 (1955). This Act provides that:

> [I]n determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

Id.

[54] *See, e.g.*, UNIFORM COMPARATIVE FAULT ACT § 2, 12 U.L.A. 43 (Supp. 1985). The comment to § 2 suggests that the total of the several percentages of fault for the plaintiff and all defendants should add up to 100%.

[55] The UNIFORM COMPARATIVE FAULT ACT was approved by the National Conference of Commissioners on Uniform State Laws in 1977. Section 3 of the Act was amended by the National Conference in 1979.

apportionment or responsibility? Some courts have declared that like oil and water, or apples and bananas, they cannot be mixed or compared, and these courts have therefore continued to apply the rule that a plaintiff who is contributorily negligent can recover the full amount of his damages from the defendant who is subject to strict liability.[56] But this is reverting to the old all-or-nothing policy of contributory negligence. The first one awards nothing and is unfair to the plaintiff; this one awards all and is unfair to the defendant. The only fair rule apportions the responsibility according to the relative fault of the parties (including the extent of the risk created by each) and the closeness of the causal relation.[57]

The same problem can affect the contribution element, too. Suppose negligent plaintiff A is injured by a car negligently driven by B. A also joins car manufacturer C, showing a design defect in the vehicle. A's recovery against B is reduced by his proportionate negligence. If the court holds that recovery against C is not so reduced, how can the responsibility be fairly apportioned among B and C? Think about that one for a while, and you will understand better what the Texas court was faced with in *Duncan v. Cessna Aircraft Co.*[58]

3. *Joint-and-Several Liability or Separated Liability.* The general common-law rule has been that when the conduct of several tortfeasors concurs to produce the plaintiff's injury, the

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[56] *See, e.g.*, Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976)(applying Nebraska law; contributory negligence defense not available in products liability action); Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835, 837-38 (1976)(jury's consideration of comparative fault is not appropriate in products liability cases).

[57] *See* Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197, 199-205 (1983)(thorough discussion of comparative fault and strict liability); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428-29 (Tex. 1984)(adopting "pure" comparative fault in product liability suits); *see also* UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. 39 (Supp. 1985).

[58] 665 S.W.2d 414 (Tex. 1984). Under Texas law prior to *Duncan*, the only defenses to a strict product liability action were assumption of risk and the similar defense of unforeseeable product misuse. *Id.* at 423. The Texas Supreme Court, finding no reason for allowing a defendant to escape the liability that the jury had allocated to him, irrespective of the responsibility allocated to the plaintiff, held that the policy considerations underlying strict liability in tort would best be served by pure comparative fault. *Id.* at 429. The most remarkable circumstance about the holding is that it was reached despite the fact that the Texas statute on comparative negligence adopted a modified form.

tortfeasors are liable jointly and severally.[59] That is, each is liable for the whole amount of damage. In most states, contribution has allowed a tortfeasor having to pay to divide that loss among all the tortfeasors. If one of them is unable to pay, his part is spread among the other tortfeasors. This has proved to be a fair arrangement, but its fairness has properly been called into question now that a contributorily negligent plaintiff can recover. Influenced by this feeling, a few states have changed the rule, either by statute or judicial decision, to provide that each tortfeasor should have his apportioned share of the responsibility established, and that he is liable for it and no more.[60] This means going from one unfair rule to another that is even more unfair. Instead of imposing the risk of insolvency of one of the defendants upon the rest of the defendants it casts the total risk upon the injured party alone. Obviously, the fair solution is to spread the risk of insolvency among all of the parties at fault, including the plaintiff, if he is contributorily negligent. This is the position taken by the Uniform Comparative Fault Act and several jurisdictions.[61]

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[59] *See, e.g.*, Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33, 37-39 (1961)(concurrent, but not necessarily simultaneous, independent acts give rise to joint and several liability); Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308, 1312-13 (1978)(en banc)(joint and concurrent tortfeasors each liable for entire harm caused, assuring full compensation to injured party). *See generally* La Forte, *Recent Developments in Joint and Several Liability*, 24 SYRACUSE L. REV. 1319 (1973); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

Joint and several liability is commonly applied in the situation where more than one person is subject to a common duty and that duty is breached. *See* Witucke v. Presque Isle Bank, 68 Mich. App. 599, 243 N.W.2d 907, 911 (1976)(common obligation to maintain repair of railroad track); Johnson v. Chapman, 43 W.Va. 639, 28 S.E. 744, 745 (1897)(party wall requiring maintenance by multiple adjoining owners causes injury); *see also* RESTATEMENT (SECOND) OF TORTS § 878 (1977)(each person subject to liability for harm resulting from failure to perform common duty).

[60] *See, e.g.*, KAN. STAT. ANN. § 60-258(a)(1983)(jury shall return special verdicts determining percentage of fault attributable to each party); OHIO REV. CODE ANN. § 2315.19 (Page 1981)(formula considers relative fault of parties to the action); Bartlett v. New Mexico Welding Supply, Inc. 98 N.M. 152, 646 P.2d 579, 536 (N.M. Ct. App. 1981) (judicial abolition of joint and several liability), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

[61] *See* UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 39 (Supp. 1985); *see also* Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with* American Motorcycle Association v. Superior Court, 30 HASTINGS L.J. 1464, 1491-94 (1979)(only solution is to distribute shortfall among solvent par-

4. *Nonjoinder.* Some statutes provide that the court will assess the proportionate responsibility, not only of the parties to the action but also of other persons whose conduct might have contributed to the injury.[62] This assessment cannot be binding on the nonparty.[63] It produces the unseemly result of the other defendants trying to cast as much blame as possible on the nonparty, thus making it necessary for the plaintiff to try to defend him. The potential harm can be alleviated by spreading the nonparty's liability among all the other parties at fault, including a negligent plaintiff, as I explained earlier;[64] but exactly the same result is reached by simply ignoring the nonparty and not attempting to assess his responsibility.[65] There is no point in spin-

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ties, including plaintiff).

[62] *See, e.g.*, KAN. STAT. ANN § 60-258a(d)(1983). This statute has been construed to mean that "the proportionate fault of all participants in an occurrence must be determined in a single action, even though some participants cannot be joined in the action or required to pay their proportionate fault." Hefley v. Textron, Inc., 713 F.2d 1487, 1496 (10th Cir. 1983)(citing Albertson v. Volkswagenwerk Aktiengesellschaft, 230 Kan. 368, 634 P.2d 1127, 1132 (1981)); Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788, 803 (1980). It has been noted that such an application of "several liability," in which the plaintiff's award is reduced by an amount related to the fault of the non-defendant tortfeasors, "transfers to the plaintiff the principal incentive to join all potentially liable defendants." W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS § 67, at 475, 476 n.64 (5th ed. 1984)[hereinafter cited as PROSSER & KEETON].

[63] "Since the absent tortfeasor is not bound by the determination made in a suit in which he was not a party, there is always the risk that an inconsistent judgment will be rendered in a subsequent action." Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 LA. L. REV. 373, 389 (1980).

[64] *See supra* note 61 and accompanying text.

[65] For example, consider the following fact situation: The negligence or fault of plaintiff A causes 10% of his damages. Defendant B's fault is assessed at 20%; defendant C's at 50%. Tortfeasor D is a non-party in the action, and is assessed with 20% of the responsibility. A's damages equal $100,000.

Spreading the nonparty's liability among all the other parties at fault will require that the 20% assessed to D be assessed to A, B, and C, in amounts determined by their proportionate fault when compared with each other. This proportion may be expressed in terms of a ratio of 1:2:5. Therefore, A will be assessed with 1/8 of $20,000 (D's proportionate share), or $2,500. This amount added to A's own share of the damages ($10,000) is equal to A's total share, or $12,500. B will be assessed 2/8 of D's share, or $5,000, in addition to his own $20,000 proportionate share. C will be assessed with 5/8 of $20,000, or $12,500, plus his own $50,000 share, leading to a total of $62,500.

To reach the same result by simply ignoring the nonparty and not attempting to assess his responsibility, one must assume that the finder of fact will find the responsibility of A, B, and C to be the same when compared to each other as is stated in the above example (a 1:2:5 ratio). The proportionate share of A, B, and C would be 1/8, 2/8, and

ning wheels to accomplish nothing. If a state seeks to assess the apportionment of a nonparty and then throws the total risk of nonpayment upon the injured party, the result is pernicious, especially when the nonparty cannot be reached or is unknown, as in the case of a hit-and-run driver.[66]

5. *Immunities.* If one "tortfeasor" has an immunity, the best treatment is to ignore him, as in the case of a nonparty.[67] There are questions, of course, as to whether the immunity applies, or should apply, to a suit for contribution instead of the original tort[68] and as to the general scope of the immunity.[69] A major problem is created by the employer's liability to a third party, such as a manufacturer, when his employee is injured.[70]

5/8 multiplied by A's total damages of $100,000. The three parties to the action would therefore be assessed with the same share of damages as was obtained in the example above: $12,500, $25,000, and $62,500, for A, B, and C, respectively. Therefore, following either method, A would recover $25,000 from B and $62,500 from C.

See also Chamallas, *supra* note 63, at 389-96 (discussing various methods of damage apportionment in related situations).

[66] *See generally* Fleming, *supra* note 61, at 1483-84, 1491-94 (discussing various theories of apportionment of fault among parties and non-party participants; recommending that the share of absent or insolvent tortfeasors be distributed among parties found to be at fault, in proportion to the parties' respective shares of responsibility).

[67] *See generally* Wade, *Comparative Negligence—Its Development in the United States and its Present Status in Louisiana*, 40 La. L. Rev. 299, 315-17 (1980).

[68] *See* Prosser & Keeton, *supra* note 62 at 339-40 (5th ed. 1984)(noting general rule that, if the contribution defendant was originally immune to suit by the plaintiff, he cannot be liable for contribution). However, some cases hold that intra-family immunity is procedural in nature; therefore, the immune party may be liable in a suit for contribution. Wade, *supra* note 67, at 316 (citing Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965)); Prosser and Keeton, *supra*, at 339 n.32 (citing Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963)). In addition, New York has held that, if a parent has furnished a dangerous instrumentality to his child, and the parents' fault combined with the fault of a joint tortfeasor causes the child to be injured, the parent may be liable to the joint tortfeasor for contribution, although immune from initial suit by the child. Prosser & Keeton, *supra*, at 910 (citing Nolechek v. Gesuale, 46 N.Y.2d 332, 385 N.E.2d 1268 (1978)).

[69] *See generally* Pearson, *Apportionment of Losses under Comparative Fault Laws—An Analysis of the Alternatives*, 40 La. L. Rev. 343, 367 (1980). In cases of total immunity, such as immunity of the sovereign, Professor Pearson believes that the immune tortfeasor's share of the damages should be apportioned among all negligent parties. However, if the immunity is effective only against the plaintiff, such as family immunity, Professor Pearson advocates a system under which the plaintiff would absorb all damages apportioned to the immune tortfeasor. *Id.* at 367-68.

[70] *See* Wade, *supra* note 67, at 316-17. While some states presently allow a manufacturer to recover contribution against an employer who is in part responsible for his

The original worker's compensation trade-offs[71] did not contemplate this problem, which needs careful consideration. The conflicting policy elements in compensation legislation and in contribution between joint tortfeasors must be reconciled in some fashion.

6. *Release of Tortfeasor.* This difficult problem admits of three possible solutions, none of which is entirely satisfactory. There are authorities supporting each. Ironically there have been three different uniform acts, each adopting one of the three solutions.

Assume a case in which P is injured through the concurrent negligence of A, B and C. P settles with A for $2,000, retaining his rights against B and C. He obtains a judgment against them for $12,000. They pay $10,000 ($12,000 minus the $2,000 paid by A) and seek contribution from A of $2,000, thus making responsibility for each of $4,000. The 1939 Uniform Act provided for contribution,[72] taking the position that this was a result fair to all parties.[73] The trouble with this solution is that it discourages settlements.[74] A defendant (and particularly his insurance company) would not be inclined to settle if there remained a continuing likelihood of being liable for additional payments.[75]

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employee's injury, the majority do not. *Id.*

[71] Here I refer to the "trade-offs" originally contemplated by adoption of the workers' compensation system: the employer undertakes to pay compensation, even though not at "fault," and gives up specific defenses otherwise allowable, in return for immunity from common-law tort liability.

[72] UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 2, 12 U.L.A. 57 (1975).

[73] *See* COMMISSIONERS PREFATORY NOTE (1939 ACT), 12 U.L.A. 60-61 (discussing policy underlying purposes of 1939 ACT).

[74] UNIF. COMPARATIVE FAULT ACT § 6 comment, 12 U.L.A. 48 (Supp. 1985). The comment acknowledges that a tortfeasor has no reason to settle if he remains liable for contribution. *Id.* Courts have noted that the desired effect of the adoption of the Act is to encourage settlements. *E.g.*, LaHocki v. Lowtee Sand & Gravel Co., 41 Md. App. 579, 398 A.2d 490, 513 (1979), *rev'd on other grounds*, 286 Md. 579, 410 A.2d 1039. *See generally* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 224 (1955)(no defendant wants to settle when he remains open to contribution in an uncertain amount).

[75] *See* Comment, *Joint Tortfeasors—Contribution—Release—Common Law Abrogated.* MASS. GEN. LAWS ANN. ch. 231B (Supp. 1962); 43 B.U.L. REV. 417, 426 (1963)(under 1939 Act, release of tortfeasor did not preclude contribution action against him thus rendering him liable for further responsibility).

The second solution (1955 Act)[76] was to make the settlement controlling on all of the parties, so long as it was made in good faith.[77] The trouble with this solution was that although it encouraged settlements[78] it was conducive to collusion between P and A and was unfair to B and C, who were not party to the settlement.[79] In addition, the express good-faith condition leaves doubt as to whether the settlement would stand up against an attack.[80]

The third solution (Uniform Comparative Fault Act, 1979)[81] lets the settlement stand and does not affect the rights of B and C. Instead it directs an assessment of A's equitably apportioned responsibility and a subtraction of that amount from the sum that P can collect.[82] The effect of this plan is that P sells, for the amount established in the settlement, his claim against A for A's equitably apportioned responsibility, no matter whether it is more or less than the settlement amount. The only persons affected by the settlement are P and A, who voluntarily entered into it, and each of them consciously takes the risk that the settlement will not work out in his favor. The drawback to it is that it may not strongly encourage a plaintiff to settle.[83] On the whole I find this solution to be the most desirable of the three, and I recommend it.[84]

7. *Other Relevant Factors.* I could discuss a number of other relevant questions; but must content myself with pointing out some of them. (1) Is set-off indicated in a case where both parties were at fault and injured?[85] (2) If the products liability

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[76] UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1955).

[77] UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4, 12 U.L.A. § 4 comment (a) (1975).

[78] *See* Comment, *supra* note 75, at 426-27 (1955 Act was intended to encourage settlement by providing that, in § 4, good faith release of tortfeasor precludes action against him by other tortfeasors for contribution).

[79] UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. § 6 comment (Supp. 1985).

[80] *Id.*

[81] UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 40 (Supp. 1985).

[82] UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 48 (Supp. 1985).

[83] Comment to UNIF. COMPARATIVE FAULT ACT, *supra* note 79, at 48.

[84] *See* Theobald v. Angelos, 44 N.J. 228, 208 A.2d 129, 134 (1965)(judicial adoption of the plan).

[85] The Uniform Comparative Fault Act provides that

[A] claim and counterclaim shall not be set off against each other, except by

claim is based on breach of warranty (express or implied) or on misrepresentation, what is the effect on loss apportionment?[86] (3) May two parties be treated as one for purposes of fault apportionment—e.g., manufacturer and retailer who have no independent fault?[87] (4) What is the role of the statute of limitations, especially if one defendant is entitled to a shorter limitations period?[88] (5) How should liability be apportioned

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agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

UNIF. COMPARATIVE FAULT ACT § 3, 12 U.L.A. 42 (Supp. 1985). The comments to this section of the Act set forth several illustrations of the effects of set-off under the Act.

The Rhode Island and Oregon statutes prohibit set-off in comparative negligence actions. *See* R.I. GEN. LAWS § 9-20-4.1 (Supp. 1984); OR. REV. STAT. § 18.490 (1983).

[88] One writer has suggested that some jurisdictions would apply comparative fault principles to implied warranty cases where contributory negligence has been applied. H. WOODS, COMPARATIVE FAULT § 14:16 (1978). Because a claim based upon warranty is a contract action, negligence is not usually involved and many jurisdictions do not recognize the defense in warranty cases. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 3.9, at 416 (1967 & Supp. 1978).

The Arkansas statute has ensured that comparative apportionment of fault will apply to breach of warranty actions by expressly stating so. ARK. STAT. ANN. § 27-1763 (1979). So has the UNIFORM COMPARATIVE FAULT ACT § 1.

As to the effect of assumption of risk principles upon warranty actions, H. Woods has suggested that

> [C]omparative negligence will have a marked effect on the application of these defenses. There will undoubtedly be a trend toward examining the conduct of the parties in terms of the total fault of each, whether it be termed "contributory negligence," "assumption of risk," "breach of warranty," "culpable conduct," or some other synonymous term. Within a short time comparative negligence has given marked impetus to the merger of contributory negligence and assumption of risk as legal concepts.

H. WOODS, COMPARATIVE FAULT § 14:16, at 273-74.

[87] The comment to section 2 of the Uniform Comparative Fault Act provides that "in situations such as that of principal and agent, driver and owner of a car, or manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault." *Id.*

[88] This problem may be approached in the same way that Section 2(d) of the Uniform Comparative Fault Act treats apportionment when there is an uncollectible obligation; that is, to reallocate the uncollectible amount among the other parties, including claimant, according to their respective percentages of fault. UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 40 (Supp. 1985).

when manufacturers are liable, in "second collision" or "crashworthiness" situations?[89] (6) If there are separate suits against different defendants with jury verdicts for different amounts of damages, how can contribution be calculated?[90] (7) What about punitive damages and contribution?[91] As you can see, any number of these complicating factors can affect both a defendant's liability and a tort victim's recovery.

IV. Conclusion

The subject of loss apportionment among multiple defendants is an extremely complicated one, especially if the plaintiff was also at fault. It requires careful study to work out solutions that are reasonable, fair and practical. The best compendium at present is the Uniform Comparative Fault Act, promulgated in 1977. After five years of study by a drafting committee composed of lawyers (representing both sides), judges and law professors, who were experienced draftsmen and had the benefit of suggestions from many others, the committee's recommendations went before the Committee of the Whole of the National Conference of Commissioners on Uniform State Laws, for intensive line-by-line criticism on three occasions. It eventually passed the Conference by a vote of forty states to eight. One section of the Act was amended in 1979, and there are a few omissions and modifications that experience has disclosed. The Uniform Comparative Fault Act fairly apportions the burden of loss between the defendants and the culpable plaintiff. It seems clear that the adoption of this Act by states, together with an alert judicial eye to any remaining inequities, will guarantee a fair treatment of all those involved in the conflict.

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[89] *See* Note, *Apportionment of Damages in the "Second Collision" Case*, 63 Va. L. Rev. 475, 475-501 (1977)(detailed discussion).

[90] In D.C. Transit Co. v. Slingland, 266 F.2d 465 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 819 (1959), when there was a judgment against tortfeasor A for $15,000 and against tortfeasor B for $10,000, this formula was used. Divide $25,000 (total of the two) into $15,000 and get 60%. Multiply $15,000 by 60% and get $9,000, and $10,000 by 60% and get $6,000. Total of both is $15,000.

[91] The problem will arise, of course, only when both parties are subject to the award of punitive damages. A contribution statute was held not to apply to punitive damages in State *ex rel.* Hall v. Cook, 400 S.W.2d 39 (Mo. 1965).

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COMMENT

FAIR APPORTIONMENT OF FAULT AMONG JOINT TORTFEASORS—A MISSISSIPPI PERSPECTIVE

The small band of plaintiffs' lawyers who, in response to constant thwarting of claims because of the common-law barrier of contributory negligence,[1] led the Mississippi legislature to adopt a comparative negligence statute in 1910,[2] may indeed have been men of great foresight. There are today, however, a variety of different comparative negligence schemes intact in many states.[3] Because the schemes of comparative negligence are not uniform, a plethora of methods has arisen for apportioning fault.[4] This comment will focus on Mississippi's scheme of fault apportionment,[5] which had its genesis in the 1910 statute inspired by that small group of plaintiffs' lawyers. Dean Wade's comments and observations as set out in the preceding article will serve as a springboard

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[1] Shell and Bufkin, *Comparative Negligence in Mississippi*, 27 Miss. L.J. 105, 105 (1956). It has also been suggested that Mississippi's comparative fault statute was passed partially in consideration of the worker's compensation laws adopted in other states. Those laws had the effect of abolishing certain common-law doctrines which, not unlike contributory negligence, had the force of a total bar to recovery. *See* Note, *Torts—Effect of Mississippi's Comparative Negligence Statute on Other Rules of Law*, 39 Miss. L.J. 493, 497-98 (1969).

[2] Act of April 16, 1910 ch. 135, § 1, 1910 Miss. Laws 125 (codified at Miss. Code Ann. § 11-7-15 (1972)). The "pure" type of comparative fault adopted by the Mississippi legislature in 1910 is now followed by the federal government and approximately nine states as well as almost all common-law jurisdictions outside the United States. Unif. Comparative Fault Act, Prefatory Note, 12 U.L.A. 39 (Supp. 1985).

[3] *See* Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 La. L. Rev. 343, 343 (1980)(noting that comparative negligence is by no means a "unitary concept").

[4] *Id.* Professor Pearson resounds the sentiment that the computation of shares of negligence and fault is indeed no easy task. *Id.* at 348.

[5] Special attention will be focused upon the apportionment scheme where conduct attributable to at least two parties has caused injury to the plaintiff, and one of the causes of injury was a defective product.

upon which to launch this analysis, and from which comparisons and recommendations will be drawn.[6]

In 1910, Mississippi, a state slow to urbanize and industrialize, became the first state to promulgate a comprehensive comparative negligence statute.[7] The legislators saw fit to adopt "pure" comparative negligence which, by definition, permits a plaintiff to pursue a claim regardless of his degree of fault.[8] The rather clear intent of the legislators who passed the original comparative negligence statute was to ensure that an injured party's negligence should not bar recovery for the injury.[9] The question is, however, what effect did the court's subsequent application of the statute have on the existing common-law defenses?

Prior to the passage of the 1910 statute, Mississippi recognized both the doctrines of "last clear chance"[10] and "assumption of risk."[11]

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[6] *See* Wade, *Multiple Tortfeasor Liability in Products Liability Suits*, 55 MISS. L. J. 683 (1985).

[7] *See* Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 302 (1980)(tracing the development of comparative negligence in the United States). The act originally referred solely to actions for personal injury or death, but was amended in 1920 to include actions for damages to property. Shell and Buffkin, *supra* note 1, at 105.

The constitutionality of the comparative negligence statute was tested shortly after its' promulgation. The Mississippi Supreme Court upheld the constitutionality of the act, holding that it was clearly within the police power of the state. Natchez & S.R.R. v. Crawford, 99 Miss. 697, 718-19, 55 So. 596, 599 (1911)(suit where railroad switchman sought recovery for severe foot injury sustained while attempting to push a defective drawhead into place). The court was quick to note that the only change the act had made in the common law was to remove the absolute bar from recovery on the part of the contributorily negligent plaintiff. *Id.*

[8] *See, e.g.*, Yazoo & M.V.R.R. v. Carroll, 103 Miss. 830, 835, 60 So. 1013, 1014 (1913)(suit by 17-year-old boy who was killed when train car upon which he was climbing was struck, throwing him from car which then passed over and crushed him). The court noted that recovery would not be barred, but damages would be diminished in proportion to the amount of negligence attributable to the injured person. *Id.*

[9] Note, *supra* note 1, at 497. The Mississippi Senate and House voiced unanimous approval of the amended version of the statute in 1920. HOUSE JOURNAL, State of Mississippi at 1494 (1920); SENATE JOURNAL, State of Mississippi at 1164 (1920).

[10] *See, e.g.*, Fuller v. Illinois Cent. R.R., 100 Miss. 705, 717-19, 56 So. 783, 785-87 (1911)(contributory negligence of deceased, whose wagon was struck by train at dirt crossing, would not defeat action if defendant could have prevented accident by exercise of ordinary care); Christian v. Illinois Cent. R.R., 71 Miss. 237, 240, 12 So. 710, 711 (1893)(while railroad employees are not bound to keep lookout for trespassers on tracks, they must exercise reasonable care to prevent injury to trespasser).

[11] *See, e.g.*, McMurtry v. Louisville, N.O. & T. Ry. Co., 67 Miss. 601, 607, 7 So. 401, 403 (1890)(those who persist at making "leaps at flying trains" and knowingly take chances must understand that consequences of their conduct must be visited upon them-

Since passage of the comparative negligence statute, the "last clear chance" doctrine has been sparingly acknowledged in Mississippi. In fact, the doctrine did not appear for over forty years after passage of the 1910 statute.[12] In 1953, however, the United States Court of Appeals for the Fifth Circuit suggested that the "last clear chance" doctrine was still alive and well in Mississippi.[13] Yet the same court later acknowledged that the "last clear chance" doctrine lost much of its importance in light of Mississippi's comparative negligence statute.[14] Further, several commentators have subsequently noted that the need for the "last clear chance" doctrine is superseded in light of comparative negligence, particularly when the doctrine is viewed as bearing on the relative fault of the parties.[15]

A careful analysis of Mississippi Supreme Court decisions after 1910 indicates an inconsistent treatment and application of the common-law assumption of risk defense.[16] In the 1947 case of *Saxton v. Rose*,[17] the Mississippi Supreme Court held that the common-law as-

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selves); Dowell v. Vicksburg & M.R.R. Co., 61 Miss. 519, 532, (1884)(plaintiff in habit of boarding moving trains with impunity assumed risk and could not recover).

[12] Shell and Bufkin, *supra* note 1, at 111.

[13] Underwood v. Illinois Central R.R., 205 F.2d 61, 63 (5th Cir. 1953)(suit by motorist and passenger for injuries sustained in railway crossing mishap).

[14] Illinois Central R.R. v. Underwood, 235 F.2d 868, 874 (5th Cir. 1956). The Fifth Circuit, recoiling from its previous decision, implied that the doctrine still exists. *Id.*

In Wright v. Standard Oil Co., 470 F.2d 1280 (5th Cir. 1972), the Fifth Circuit, applying Mississippi law to a truck accident case, noted that the "conscious" last clear chance rule set out in RESTATEMENT (SECOND) OF TORTS § 479 (1965), is still applicable in Mississippi. *Wright*, 470 F.2d at 1294. One writer has suggested that the "negative implication" of the Fifth Circuit's holding is that the "unconscious" last clear chance rule—applicable "when a defendant should have known" a plaintiff was in a position of "inextricable peril," but did not actually know—has not retained its application considering the comparative negligence statute. *See* Twyner, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L.J. 563, 572 (1982).

[15] *See* Twyner, *supra* note 14, at 573 (last clear chance presents needless duplication in system of comparative negligence); Note, *supra* note 1, at 498-99 (doctrine not needed). *See generally* Note, *Comparative Negligence and the "Jackass Doctrine" (Last Clear Chance)*, 6 S. DAK. L. REV. 96, 103-104 (1961).

[16] Assumption of risk was not expressly abolished upon adoption of the comparative negligence statute, but the Mississippi Constitution abolished the application of the assumption of risk defense to employees of railroads, MISS. CONST. art. VII § 193, and the doctrine was removed as an available defense in master-servant situations excepting train conductors or engineers in charge of dangerous engines. Act of Feb. 28, 1914, ch. 156, 1914 MISS. LAWS (codified at MISS. CODE ANN. § 11-7-19 (1972)). Assumption of risk was abolished as an employer's defense through the 1948 enactment of Mississippi's worker's compensation statute. MISS. CODE ANN. § 71-3-9 (1972).

[17] 201 Miss. 814, 29 So. 2d 646 (1947).

sumption of risk doctrine was in "full force" in Mississippi except in master-servant situations.[18] Later, in *Braswell v. Economy Supply Co.*,[19] the supreme court came to the conclusion that in the instances where the assumption of risk doctrine overlaps contributory negligence, the rules of the contributory negligence defense should apply.[20] The general consensus of commentators, however, has been that Mississippi should abolish the assumption of risk doctrine as a matter of law.[21]

I. Indemnity Among Joint Tortfeasors in Mississippi

In Mississippi, indemnity was recognized as a cause of action at least as early as 1838.[22] Probably the most familiar category of indemnity recognized in Mississippi is what has been termed "express contractual indemnity,"[23] which includes the common "hold-harmless" agreements. The 1969 Mississippi case of *Blain v. Sam Finley, Inc.*,[24] reveals the typical express contractual indemnity agreement between a prime contractor and his subcontractor.[25] Although the theory of im-

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[18] *Saxton* dealt with a suit stemming from the death of one who was riding in the cab of a truck. The decedent was totally aware that the driver of the defendant's truck was intoxicated. *Saxton*, 201 Miss. at 820, 29 So. 2d at 647; *see* Note, *Negligence—Automobile Accidents—Assumption of Risk as a Defense—Contributory Negligence Distinguished*, 19 Miss. L.J. 369, 370 (1948)(examining assumption of risk doctrine and *Saxton* case). The *Saxton* ruling has been labeled unjust in light of Mississippi's comparative negligence system. Note, *supra* note 1, at 500-01. *See generally* Twyner, *supra* note 14, at 575-76 (discussing criticism of *Saxton*); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 La. L. Rev. 5 (1961).

[19] 281 So. 2d 669 (Miss. 1973).

[20] *Id.* at 667. In a recent opinion the Mississippi Supreme Court noted the difficulty which courts "have always had in keeping clear the unclear distinctions between contributory negligence and assumption of risk." Hill v. Dunaway, slip. op. 56,482 (Miss. April 23, 1986). In *Dunaway*, the court suggested that even if assumption of risk is to remain a viable doctrine, it overlaps substantially with contributory negligence. The court, in a footnote, remarked that assumption of risk is only an "artificial way of denominating a plaintiff's negligence." *Id.* slip op. at 5.

[21] *See* Twyner, *supra* note 14, at 579 (unreasonable assumption of risk is analogous to contributory negligence; therefore, Mississippi's position should be altered with regards to the doctrine); Wade, *Some Recent Changes in the Law of Torts*, 38 Miss. L.J. 565, 572 (1967)(assumption of risk analogous to contributory negligence should fall within purview of comparative negligence statute); Note, *supra* note 1, at 501 (spirit of comparative negligence dictates abolition of assumption of risk).

[22] *See* Hough v. Perkins, 3 Miss. (2 How.) 724 (1838)(action on indemnity bond).

[23] *See* Comment, *Indemnity Among Joint Tortfeasors*, 43 Miss. L.J. 670, 676 (1972)(noting subdivisions of indemnity based on source of the obligation).

[24] 226 So. 2d 742 (Miss. 1969).

[25] *Id.* at 744. The court noted that the indemnitee will be indemnified even against

plied contractual indemnity has received relatively little attention in Mississippi, the supreme court has recognized the theory in the case of *Bush v. City of Laurel*.[26] It has been suggested, however, that this theory offers particular appeal to imaginative counsel seeking recovery in instances where it would be otherwise prohibited.[27]

The final form of indemnity that Mississippi recognizes, common-law or noncontractual indemnity, has resulted in the most ambiguous applications of the indemnity theory.[28] Perhaps the most expansive judicial consideration of the problem of determining the character of fault attributable to a joint tortfeasor in a common-law indemnity claim arose in the 1970 case of *Home Insurance Co. v. Atlas Tank Manufacturing Co.*[29] In that case the Mississippi Supreme Court was confronted with a situation where Henry Reese, an employee of Atlas, had been electrocuted when a piece of machinery, which he was operating beneath a utility line owned by Mississippi Power and Light Company (MP&L), came into contact with the line.[30] MP&L and Home Insurance Company, its insurer, sought indemnification from Atlas for money paid in settlement with the heirs of Reese.[31] The Mississippi Supreme Court stated that it was doubtful whether more "vivid example[s]" of "virulent negligence" on the part of Atlas or "gross negligence" on the part of MP&L could be found in any of its prior decisions.[32] The court held that "where the fault of each is equal in grade and similar in character," the doctrine of indemnity is not available.[33] The court concluded that the determination in Mississippi of whether

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his own negligence when the contract clearly shows this to be the intention of the contracting parties. *Id.* at 746.

[26] 215 So. 2d 256, 259 (Miss. 1968).

[27] Comment, *supra* note 23, at 679.

[28] The foremost analytical probe into the possible application of common-law indemnity centers around the degrees or eminence of fault ascribed to each joint tortfeasor involved. Comment, *supra* note 23, at 680. Many courts permit reimbursement to the joint tortfeasor whose fault is typically labeled simply "passive or secondary" as opposed to the joint tortfeasor whose fault is declared "active or primary." *See* Wade, *supra* note 6, at 686. It should be noted, however, that cases which have applied the "active-passive" test have been criticized with regularity. *See* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 539-44 (1952).

[29] 230 So. 2d 549 (Miss. 1970).

[30] *Id.* at 550. MP&L and its insurer entered into a $40,000 settlement agreement with the heirs of Henry Reese. *Id.*

[31] *Id.*

[32] *Id.* at 554.

[33] *Id.* at 551; *see also* Bush v. City of Laurel, 215 So. 2d 256, 260 (Miss. 1968)(no right of contribution where parties are joint tortfeasors, as when injury resulted from concurrent negligence).

indemnity shall be permitted must necessarily depend on the facts of each case.[34] As a practical consideration, this leaves Mississippi with an inartful design for the consistent disposition of common-law indemnity claims, particularly in light of the absence of an adequate definition of, and fine lines drawn between, active and passive negligence.[35]

II. Mississippi's Approach to Contribution Between Joint Tortfeasors

On April 15, 1952, chapter 259 of the Mississippi Laws of 1952 went into effect.[36] The effect of the new statute was ostensibly to create rights of contribution, previously unavailable in Mississippi,[37] between or among joint tortfeasors. The statute, now codified as section 85-5-5 of the Mississippi Code, provides for contribution between joint tortfeasors only in the event that a judgment has been rendered against them:

> In any action for damages where judgment is rendered against two (2) or more defendants, jointly and severally, as joint tortfeasors, the defendants against whom such a judgment is rendered shall share equally the obligation imposed by such judgment, and if one (1) of such defendants pays an amount greater than the total sum of the judgment divided by the number of defendants against whom the judgment was rendered, then the other defendants shall be jointly and severally liable to him for the amount so paid in excess of his proportionate part; provided that no defendant shall be liable to any

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[34] *Home Insurance Co.*, 230 So. 2d at 551.

[35] The active-passive test for allowance or disallowance of common-law or noncontractual indemnity has been suggested to be easier to state than to apply consistently. *See*, Comment, *supra* note 23, at 680-81 (articulating the problem inherent in employing active-passive test).

Because in Mississippi the right to contribution is limited to those instances where a joint judgment has been rendered against joint tortfeasors, one of the three available forms of indemnity may prove to be the sole remaining remedy available to a joint tortfeasor who is sued individually by the aggrieved plaintiff. Comment, *supra* note 23, at 674-75.

[36] Klaas v. Continental So. Lines, 225 Miss. 94, 109, 82 So. 2d 705, 706 (1955).

[37] *See* Meridian City Lines v. Baker, 206 Miss. 58, 80, 39 So. 2d 541, 542-43 (1949)(no apportionment of damages between bus line and city); Mississippi Cent. R.R. Co. v. Roberts, 173 Miss. 487, 505-06, 160 So. 604, 605-06 (1935)(when concurrent negligence produces a single injury, both defendants are liable for entire damage, but there is no contribution between them); Thomas v. Rounds, 161 Miss. 713, 718, 137 So. 894, 894 (1931)(tortfeasors jointly and severally liable are not entitled to contribution).

other defendant for more than his proportionate share of the original judgment.

Provided further, that in determining, for the purpose of the above contribution, the number of defendants against whom the judgment has been rendered, an employer and his employee, or a principal and his agent, shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or commission of his employee or agent.

Provided further, that the liability of such defendants against whom such a judgment has been rendered shall be joint and several as to the plaintiff in whose favor such judgment has been rendered.[38]

Twenty years ago Dean Wade pointed out the inadequacies of the Mississippi statute to members of the Mississippi Bar at the sixty-second annual meeting of the Mississippi State Bar. He suggested that the statute has application only when and if the original plaintiff has secured a judgment against both of the tortfeasors.[39] Dean Wade went on to note that the choice as to which of the potential defendants should be sued lies solely in the discretion of the plaintiff, and because Mississippi has no third-party practice, the statute is ineffective.[40] In response to just such problems with respect to contribution among tortfeasors, the Commissioners on Uniform Laws had promulgated a Uniform Act.[41] The initial paragraph of both the revised and original acts expunge the "joint judgment debtors" restriction found in the Mississippi statute.[42] At the aforementioned meeting, Dean Wade "heartily recommend[ed]" the Uniform Act for the "serious consideration" of the Mississippi Bar.[43] Nonetheless, the Mississippi statute remains in the same form as when it was promulgated in 1952.

Professor Prosser made the following remark:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one

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[38] MISS. CODE ANN. § 85-5-5 (1972). The statute has remained in its original form for almost fifty-five years.

[39] Wade, *supra* note 21, at 574.

[40] *Id.*

[41] UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 9 U.L.A. 233 (1957)(1939 version). The Act was revised in 1955.

[42] *Id.* at § 1.

[43] Wade, *supra* note 21, at 574.

> alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes "scot free."[44]

The practical application of Mississippi's contribution scheme results in exactly the kind of inequities addressed by Professor Prosser. Because Mississippi does not permit third-party practice,[45] and because of the "joint judgment" limitation of section 85-5-5, the Mississippi contribution scheme is left with no teeth. This scheme may compensate a single *individual*, yet its application fails to provide justice for *all*,[46] and it is in need of legislative surgery.

Another inequity inherent in Mississippi's scheme of contribution is the means and basis of apportionment among joint tortfeasors. Assuming that the plaintiff has received a joint judgment against the tortfeasors, Mississippi will permit a pro-rata allocation among the joint judgment debtors.[47] The case of *Celotex Corp. v. Campbell Roofing and Metal Works, Inc.*,[48] provides a good example of the applica-

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[44] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 307 (4th ed. 1971).

[45] Justice James L. Robertson of the Mississippi Supreme Court has suggested that impleader is "perfectly sensible." Robertson, *Symposium of Mississippi Rules of Civil Procedure—Joinder of Claims and Parties—Rules 13, 14, 17, and 18*, 52 MISS. L.J. 39, 71 (1982). Admittedly some delay may result from permitting a defendant to file a third-party claim, but this may lead to the avoidance of both multiplicity of action and congestion of trial dockets. *See* Note, *supra* note 1, at 494.

[46] In his dissenting opinion in the case of American Motorcycle Assoc. v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), Justice Clark suggested that "[p]lacing the entire loss attributable to the insolvent defendant solely on the negligent plaintiff or solely on the solvent negligent defendant undermines the entire system of comparative fault." 578 P.2d at 923, 146 Cal. Rptr. at 206.

It is indeed interesting that in the state which was one of the first to adopt comparative negligence, a paradox results from the application of Mississippi's scheme of contribution among joint tortfeasors. The jury is permitted to apportion both fault and damages among plaintiffs and defendants on one hand, yet on the other hand the jury cannot apportion damages among joint tortfeasors. *See* Maraist & Barksdale, *Mississippi Products Liability—A Critical Analysis*, 43 MISS. L.J. 139, 191 (1972)(judgment debtor may not recover from third persons unless third person is also joint judgment debtor, or third person is liable under rules of indemnity).

The third-party practice available in the federal court system is ineffective in a contribution case because the substantive law of Mississippi does not permit that right. *See* Allen, *Joint Tortfeasors—A Case for Unlimited Contribution*, 43 MISS. L.J. 50, 62 (1972). Some delay in the judicial process may result from permitting a defendant to file a third-party claim; on the other hand, congested trial dockets may be relieved and multiplicity of suits may be avoided. *Id.*

[47] MISS. CODE ANN. § 85-5-5 (1972).

[48] 352 So. 2d 1316 (Miss. 1977).

tion of section 85-5-5. In that case, Celotex, a supplier of roofing materials, and Campbell, a roofing subcontractor, were called on to indemnify the general contractor in a "leaky roof" case.[49] A joint and several judgment was rendered against both Campbell and Celotex for $32,766.10, and Celotex was forced to pay the entire amount of the judgment.[50]

Celotex then sought contribution from Campbell "for a minimum of ninety percent of the judgment" paid by Celotex.[51] Celotex argued that the "better and more equitable rule" would be one of apportioning the respective liability of the judgment debtors based on their relative fault, rather than upon a pro-rata division.[52] The Mississippi Supreme Court, however, held that "for the sake of consistency" the policy established in section 85-5-5, providing for contribution on a pro-rata basis, should be followed.[53] Thus, for the sake of consistency, Mississippi's provisions for pro-rata loss apportionment leave the comparative fault scheme practically bankrupt.

The dominant theme of a comparative negligence or fault scheme is that liability should be predicated upon the relative portion of fault belonging to each person causing the harm or injury.[54] Another problem in the practical application of Mississippi's loss apportionment scheme is the continued recognition of joint and several liability.[55] The practical effect of this rule is that if one joint tortfeasor has settled, or is insolvent, or even if the injured party simply elects not to sue or collect from one tortfeasor, the remaining solvent tortfeasor is liable; this result, of course, demonstrates very little regard for the relative

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[49] *Id.* at 1317.

[50] *Id.*

[51] *Id.* at 1319.

[52] *Id.*

[53] *Id.*

[54] Pearson, *supra* note 3, at 349.

[55] *See* Wilson v. Giordano Ins. Agency, Inc., 475 So. 2d 414, 417 (Miss. 1985), and D.W. Jones, Inc. v. Collier, 372 So. 2d 288, 294 (Miss. 1979)(the modern trend is that joint and several liability may exist notwithstanding lack of concerted action).

The Mississippi Supreme Court has held that the "separate, concurrent and successive negligent acts . . . which combine to proximately produce [a] single, indivisible injury . . . render[s] [parties] jointly and severally liable." D.W. Jones, Inc., 372 So. 2d at 294; *see also* Westerfield v. Shell Petroleum Corp., 161 Miss. 833, 838, 138 So. 561, 562 (1932)(joint tortfeasors in Mississippi may be proceeded against singly, jointly, or individually, or all combined).

Originally, the rule for joint tortfeasor status to exist required that there be unity of purpose and concert of action, or two or more defendants working separately but for a common purpose, each acting with the other's consent and knowledge. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 418 (1937).

share of fault. In jurisdictions which recognize joint and several liability, although the more solvent tortfeasors will typically be saddled with the entire risk of loss, they may also likely have a right of contribution from others.[56] As noted earlier,[57] however, in Mississippi no right to contribution exists unless there is a joint judgment. While a blanket abrogation of the joint and several liability doctrine may indeed work a hardship upon injured plaintiffs, a system which provides for the imposition of liability among all parties at fault, including the plaintiff, in proportion to their degrees of fault, would provide a more equitable result.[58]

III. The Roles of Joinder, Vouching-in, and Allocation in Mississippi's Loss-Apportionment Scheme

As noted by Dean Wade,[59] a system of third-party practice helps to ensure that responsibility for a tort will ultimately rest upon the proper parties in proportion to their individual fault. Although Mississippi has adopted Rule 13 of the Mississippi Rules of Civil Procedure expressly for the purpose of allowing claims to be joined to expedite the resolution of controversies between litigants and to eliminate the "inordinate expense occasioned by circuity of action and multiple litigation,"[60] a third-party practice provision is conspicuously absent from the Mississippi Rules of Civil Procedure.[61] The Mississippi Supreme Court has in fact made this observation:

> It is, and should be, a paramount concern of the judiciary to prevent multiple suits when one suit will suffice. There is a

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[56] Smith and Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 Ind. L. Rev. 969, 975 (1984). The authors noted that neither abolishment of joint and several liability nor recognition of the doctrine is totally fair, because neither one of the approaches "proportions liability according to fault." *Id.*

[57] *See supra* note 38 and accompanying text.

[58] *See* Wade, *supra* note 6, at 699. This form of proportionate individual liability is provided for in the statutes of several states, including Ohio and Kansas. *See* Kan. Stat. Ann. § 60-258(a)(d)(1976); Ohio Rev. Code § 2315.19(A)(2)(Supp. 1983).

[59] *See* Wade, *supra* note 6, at 691.

[60] Miss. R. Civ. P. 13 comment.

[61] On May 26, 1981, the Mississippi Supreme Court adopted the Mississippi Rules of Civil Procedure which took effect on January 1, 1982, and were closely patterned after the Federal Rules of Civil Procedure. *See* Miss. Sup. Ct. Order of May 26, 1981, 395-97 So. 2d 1, 1 (Miss. Cases)(1981). Members of the Mississippi Bar had strongly advocated adoption of these rules for some time. *See 1981 Mississippi Supreme Court Review: Civil Procedure*, 52 Miss. L.J. 399, 401 n.6 (1982)(listing many prior articles calling for reforms in Mississippi civil practice and procedure).

> tendency, perhaps, to forget that one who undergoes the rigors of an action, with all of its traumatic impact, loss of time, delay, substantial expense and disruption of his affairs, with consequent appeals and possible retrials and still other appeals, should be spared having to do this more often than is strictly necessary.[62]

Nevertheless, just two months after the Mississippi Rules of Civil Procedure became effective, an order of the Mississippi Supreme Court deleted the third-party practice provisions.[63]

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[62] Magee v. Griffin, 345 So.2 d 1027, 1032 (Miss. 1977).

[63] The order was handed down without any explanation or analysis whatsoever. Perhaps the state bar, or a portion thereof, misunderstood the scope of the rule, believing that it would permit any defendant to bring in any other joint tortfeasor. This of course is a misconception of the impleader procedure, which only permits a defendant to bring in a third party who may be "secondarily" liable.

Apparently the Mississippi Supreme Court is once again considering adoption of a third-party practice rule. A January 6, 1986 order by Chief Justice Neville Patterson publishes a new Rule 14 with comments, and solicits suggestions, proposed modifications, deletions or amendments to the proposed rule and comments. Section (a) of the new proposed rule declares when a third party may be brought in:

> After commencement of the action and upon being so authorized by the court in which the action is pending *on motion and for good cause shown*, a defending party may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. *Any party may move to strike the third-party claim*, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. (*Emphasis added.*)

As the proposed comments to the new rule point out, the proposed rule differs from the federal version of Rule 14 in several aspects. First, a party seeking to implead a third party is required to secure authorization from the court in all cases. Of course the federal rule permits impleader without leave if the third-party complaint is filed within ten days

The primary objectives of a third-party practice rule are to save money and time, to avoid circuity of action, and to ensure that consistent results arise from one set of operative facts in one action.[64] While at common-law the aim was to limit the plaintiff's action to a single controversy between the plaintiff and the defendant, the trend under modern procedural rules is to achieve the opposite objective: to determine as many controversies as possible between as many individuals as possible within the same action.[65] The rule, which generally permits a defendant to advance a claim against a third party who may be held liable to the defendant should the plaintiff succeed in his cause, may be maintained only in the situation where the third-party defendant is "secondarily" liable to the party asserting the third-party claim in the event that this original defendant is held liable to the initial plaintiff.[66] In spite of the objections that third-party practice unduly aggravates, compounds, and complicates the issues at trial, an informed bar and bench will help to ensure a fair application of the rule. Furthermore,

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after service of the defendant's answer to the original claim. Furthermore, the proposed rule states that "any party may move to strike a third party claim." Finally, the proposed rule suggests that impleader should be permitted only for "good cause shown." Thus, it would evidently be possible that a third-party claim would be disallowed even if the technical requirements of the rule are met. Apparently impleader in Mississippi would then be available subject to the court's discretion. This restriction is most unfortunate and may result in an impleader rule with no teeth.

As this comment entered the final stages of publication, the Mississippi Supreme Court decided to adopt the new rule 14, effective July 1, 1986.

[64] C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE WITH FORMS § 422 (1960). The procedure, however, is not designed as a method of uniting in one trial separate and distinct causes of action. Woods v. Batchelder, 8 F.R.D. 194, 195 (D.C. Me. 1948).

In the United States, third-party practice appears to have had its origin in admiralty law at the hands of Judge Addison Brown, an eminent admiralty judge from the Southern District of New York. *The Hudson*, 15 F. 162, 172-75 (S.D.N.Y. 1883).

[65] Holtzoff, *Entry of Additional Parties in a Civil Action: Intervention and Third Party Practice*, 31 F.R.D. 101, 105 (1962). Judge Holtzoff suggests varying situations within the realm of the rule, including situations where the unsuccessful defendant would be entitled to contribution, indemnity, or exoneration from a third party. *Id.* Judge Holtzoff gives specific examples:

> [A]n endorser sued on a promissory note may bring in the maker as a third party defendant; a debtor may assert a third party claim against a guarantor of the obligation; one of several joint tortfeasors may seek contribution from those jointly and severally liable with him; a person who is sued for breach of contract or for negligence may interpose a claim for a breach of warranty against a third party.

Id. at 106.

[66] *Id.* A third-party complaint is not permitted where the allegation is that the original defendant is not liable to the original plaintiff, but rather that if anyone is liable to the plaintiff, the third-party defendant is. *Id.*

the trial judge in Mississippi is given, pursuant to Rule 42(b) of the Mississippi Rules of Civil Procedure, the broad discretion to determine just how the cases before him are to be tried, and may, pursuant to that rule, order separate trials to serve the ends of justice.[67] An important aspect of third-party practice is that the third-party defendant may assert against the original plaintiff any defense that the impleading party has against the plaintiff's claim. Thus, the impleaded party is not bound to raise only the issue of his secondary liability to the original defendant.[68]

A simple illustration may reveal the utility of the impleader scheme. Suppose that the plaintiff's house has burned down. The plaintiff and her insurer sue the defendant manufacturer because they have discovered that the cause of the fire was a defective electrical supply cord which the manufacturer used as a component part of its window air conditioning unit. The manufacturer, in turn, will want to implead the manufacturer/supplier of the electrical cord claiming breach of warranty. The basic issue in the case will be whether the air conditioning unit or its component parts were defective and therefore caused the fire. In this case it is clearly desirable and prudent to try all of the issues at the same time, in a single action. The use of third-party practice in this situation will help to place the ultimate liability for injury or damage where logic suggests that the liability really belongs. Given the fact that Mississippi's contribution statute provides for contribution only between joint judgment debtors,[69] and because "the prevention of multiple suits where one will suffice" has been stated as a "paramount concern" of the Mississippi judiciary,[70] prompt reconsideration of the adoption of third-party practice in Mississippi is sincerely urged.[71]

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[67] *See* MISS. R. CIV. P. 42 comment. The court has complete discretion, in light of convenience, avoidance of delay and prejudice, and considerations of expense and prudent use of time, to order separate trials. *Id. See generally* 5 J. MOORE, MOORE'S FEDERAL PRACTICE ¶¶ 42.02-42.03 (1974) and 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §§ 2381-2392 (1971) (generally discussing trial judges' discretionary power to order separate trials pursuant to FED. R. CIV. P. 42(b)).

[68] Holtzoff, *supra* note 65, at 109. Judge Holtzoff further suggests that the party impleaded normally has a grave and material interest in defeating the original plaintiff's claim, "because if the plaintiff's claim fails, there can be no secondary liability on the part of the third-party defendant." *Id.*

[69] *See supra* note 38 and accompanying text.

[70] Magee v. Griffin, 345 So. 2d 1027, 1032 (Miss. 1977).

[71] As a final note with regard to the recommended adoption of third-party practice, the utility of special verdicts should not be forgotten. No special form of a verdict is exclusively required in Mississippi. MISS. CODE ANN. § 11-7-157 (1972). In fact, Rule

Mississippi's version of the Uniform Commercial Code does have a "vouching-in" provision which, if effectively used, could provide yet another means of apportioning liability between multiple defendants.[72] The only Mississippi case which presents any significant discussion of the vouching-in provision is the recent case of *Contractor's Lumber & Supply Co. v. Champion International Corp.*[73] In that case a purchaser of roughly 190 panels of plywood siding brought suit for breach of warranty against both the manufacturer of the plywood and the lumber company which sold the panels.[74] The plaintiff claimed that the panels in question "began to delaminate" shortly after he had installed them on a church building, although the installation and finishing instructions of the manufacturer were followed.[75] While the lumber company did file a cross-claim against the manufacturer for indemnification as to any amount it might be "judicially determined liable for" plus any attorneys' fees and costs expended in defending the action, the lumber company did not tender the defense of the action to the manufacturer pursuant to Mississippi's vouching-in statute.[76] The Mississippi Supreme Court held that the failure of the lumber company to tender defense of the action to the manufacturer precluded recovery of attorney's fees from the manufacturer.[77]

The court noted that if a party finding itself in the position of the manufacturer in this case were properly notified,[78] it could then de-

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49(b) of the Mississippi Rules of Civil Procedure provides for special verdicts as an alternative to the general verdict. This form of verdict requires that the jury make certain specific written findings on particular issues of fact. *See* MISS. R. CIV. P. 49(b) and comment. The use of the special verdict would likely be a most helpful procedural tool to avoid complications and confusion on the part of the jury in cases where a third party has been impleaded.

[72] MISS. CODE ANN. § 75-2-607(5)(a)(1972).

[73] 463 So. 2d 1084 (Miss. 1985).

[74] *Id.* at 1085.

[75] *Id.*

[76] *Id.* Eventually the manufacturer settled with the purchaser of the plywood panels. The circuit court upheld the manufacturer's motion to dismiss the lumber company's cross-claim and the lumber company appealed. *Id.* at 1086.

[77] *Id.* at 1087.

[78] As to what is proper notice in Mississippi, the court stated:

> The statute permits a buyer, who is sued for breach of warranty or other obligation for which his seller is answerable over, to bind the seller in the action against the buyer if the buyer gives the seller written notice of the litigation, and the notice tenders defense of the litigation to the seller. Of course, if the seller is a defendant in the litigation, the buyer is not required to give written notice of the litigation, but in order to bind the seller, must tender defense of the litigation to the seller in writing.

fend, "interposing any defense available; and by protecting his own rights he will naturally protect the rights of the party vouching him in."[79] An important observation is that this scheme of vouching-in does not involve a question of jurisdiction, but rather, merely a question of contract.[80] Another question concerning the vouching-in provision is its relation to third-party practice. Apparently, because the "vouched-in" party defends the action in the name of the initial defendant, the procedure of vouching-in does not make that "vouched-in" party a defendant.[81] The Code provisions were not designed to effect procedure;[82] thus, the vouching-in provisions of section 75-2-607(5)(a) of the Mississippi Code cannot be used to circumvent the prohibition of third-party practice in this state.

Another means of apportioning the responsibility for tort damage or injury is through allocation of liability proportionately, so that the parties involved will all know what share of the ultimate award they

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Id. at 1086.

[79] It seems possible, however, that a conflict of interest problem may arise. It is most unlikely that a manufacturer/seller will assert a whole-hearted defense on behalf of his buyer in the event that the original plaintiff attempts to prove facts which would make the buyer liable, yet prove the manufacturer/seller blameless. Take the example of the faulty air-conditioning unit discussed previously in the text of this comment. If the plaintiff avers that the reason the electrical cord leading to the air-conditioning unit malfunctioned was because the manufacturer was negligent in assembling the component parts, particularly the cord, then the manufacturer/seller of the electrical supply cord who may have been called on to defend is not likely to diligently oppose the contention.

If the manufacturer/seller declines to defend, he will of course be bound by any findings of fact common to the two parties. *Id.; accord* International Harvester Co. v. TRW, Inc., 107 Idaho 1123, 695 P.2d 1262, 1265 (1985)(manufacturer of steering gear bound by any common determination of fact because manufacturer declined tendered defense). The provisions of § 2-607(5)(a) are not enforced by the initial judgment because that judgment cannot bind the manufacturer/seller in the absence of jurisdiction over him; but enforcement is accomplished by a separate suit filed by the defendant in the initial suit against the manufacturer/seller. W. HAWKLAND, 3 UNIFORM COMMERCIAL CODE SERIES § 2-607:10, at 74 (1984). The binding effect of any determination of fact in the initial suit is not premised on a theory of collateral estoppel or res judiciata, both being jurisdictional concepts, but rather on the contractual relationship between the parties. *Id.* at 75.

[80] W. HAWKLAND, *supra* note 79, at 72. Thus, in the subsequent action for indemnity, or the "action over" suit, the plaintiff (defendant in the initial action) should first have the court make a finding of fact that the manufacturer/seller "agreed to defend the plaintiff (buyer) where the quality or title to the goods sold was put in issue by a remote party, and also agreed to be bound by determinations of fact with regard to these matters under the rules of section 2-607(5)." *Id.* at 75.

[81] R. ANDERSON, 2 ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-607:54 (1971).

[82] MISS. CODE ANN. § 75-1-103 (1972).

will bear.[83] In Mississippi, however, any attempts by a jury to apportion or allocate responsibility among joint tortfeasors will be disregarded by the court as surplusage. In the 1949 case of *Meridian City Lines v. Baker*,[84] the jury first returned a verdict against joint defendants as follows: "We the jury, find for the plaintiff against Meridian City Lines $3,500, and against City of Meridian $3,500, a total of $7,000."[85] The jury was instructed to retire again and upon further deliberation returned a second verdict: "We, the jury, find for the plaintiff as against Meridian City Lines, Inc., and City of Meridian, defendants, and assess his damages at $7,000, ($3,500 each)."[86] These verdicts appeared to be an effort on the part of the jury to allocate the damages. The court, however, discharged the extra language as "surplusage" and entered judgment against the bus line and the city jointly and severally in the sum of $7,000.[87]

Surely if enlightened juries recognize the fairness underlying allocation of the fault of the parties and apportionment of the damages, the bench and bar cannot ignore the soundness of these ideas. Allocation and apportionment can indeed co-exist with the common-law rule of joint and several liability recognized in Mississippi.[88] The plaintiff could recover the amount of his judgment solely from any one of the defendants; yet the judgment could allocate the proportionate fair share of the total obligation among the defendants. In so doing, the amount for which each defendant should be liable, based on the rules of contribution, could be determined.[89] This is the approach taken by

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[83] *See* Wade, *supra* note 6, at 691 n.37.

[84] 206 Miss. 58, 39 So. 2d 541 (1949). The plaintiff brought suit against Meridian City Lines, the City of Meridian, and another, to recover for injuries sustained when an automobile in which the plaintiff was a guest collided with a tree which was projecting over two and one-half feet into a city road. The bus allegedly contributed to the collision because it was partially across the center of the road and consequently forced the plaintiff into the tree. *Id.* at 75-82, 39 So. 2d at 541-42.

[85] *Id.* at 76-82, 39 So. 2d at 542. The court, relying on Mississippi Central R.R. Co. v. Roberts, 173 Miss. 487, 160 So. 604 (1935), declined to accept this verdict and instructed the jury to retire, read the instructions again, and come back with a proper verdict. *Baker*, 206 Miss. at 76-82, 39 So. 2d at 542.

[86] *Baker*, 206 Miss. at 76-82, 39 So. 2d at 542.

[87] *Id.* at 78-83, 39 So. 2d at 543; *see also* Gillespie v. Olive Branch Bldg. & Lumber Co., 174 Miss. 154, 160-62, 164 So. 42, 42-43 (1935)(in earlier case, jury returned verdict against jointly liable defendants of $3,500 and $4,000).

[88] *See supra* note 55 and accompanying text.

[89] *See* UNIFORM COMPARATIVE FAULT ACT § 2 comments, 12 U.L.A. 44 (Supp. 1985). An illustration may be helpful: suppose A sues B and C for personal injury and A's damages are $50,000. A is found to be 10% at fault; B is found to be 50% at fault; and C is found to be 40% at fault. A may be awarded a judgment jointly and severally against

section 2 of the Uniform Comparative Fault Act[90] which, if adopted in

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both B and C for $45,000 ($50,000 less the 10% by which A is at fault). B's fair share would be $25,000 (50% of $50,000) and he would be liable in an action for contribution by C, for this amount. C's fair share would be $20,000 (40% of $50,000) and she would be liable, in an action for contribution by B, for this amount. A, however, may collect the full $45,000 from either B or C.

An interesting problem should be noted with regard to loss apportionment under Mississippi's Wrongful Death statute. MISS. CODE ANN. § 11-7-13 (Supp. 1984). Because the wrongful death action is derivative in nature, the contributory fault of the *decedent* will reduce the award to the statutory beneficiaries. Likewise, the contributing fault of the *sole beneficiary* will result in a reduction of the recovery permitted in proportion to the contributory fault. If, however, fewer than *all* of the statutory beneficiaries contributed to the accident which caused the death, full recovery for all of the beneficiaries is nevertheless allowed. *See* Hines v. McCullers, 121 Miss. 666, 672-74, 83 So. 734, 736 (1920)(contributory negligence of one beneficiary does not bar recovery for any of beneficiaries). The apparent reasoning behind such a construction of the statute is that the fault of one beneficiary should in no way be imputed to the remaining beneficiaries to reduce their award.

[90] Section 2 provides:

> (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:
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> (1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
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> (2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.
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> (b) In determining the percentage of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> (c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
>
> (d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

UNIFORM COMPARATIVE FAULT ACT § 2, 12 U.L.A. 43 (Supp. 1985). Note particularly the

Mississippi, would mean an innately fairer application of comparative fault principles.

IV. The Effects of Release, Settlement, and Set-Off on Loss Apportionment in Mississippi

Any discussion of loss apportionment would be incomplete without at least a brief discussion of the unique problems associated with release and settlement. The primary question in this regard is "who should bear the burden of a loss of recovery attributable to a settling tortfeasor?" In his article, Dean Wade notes that three approaches have been taken: (1) the remaining tortfeasors are still able to receive contribution against the settling tortfeasor; (2) the remaining tortfeasors cannot recover contribution from the settler unless the release or settlement was obtained by collusion or bad faith; or (3) the plaintiff's total claim is reduced to reflect the "equitable share of the obligation" for the released party. (This assumes that there has been an allocation of the part he should pay if contribution is carried out fairly.)[91]

In Mississippi, it appears that the effect of the release or settlement with one tortfeasor on the liability of other tortfeasors is most like the second of these three alternatives. The Mississippi Supreme Court in *Medley v. Webb*[92] concluded that a claimant may settle his claim with one joint tortfeasor and preserve his claim against another joint tortfeasor, "giving credit for the amount recovered."[93] Although such an approach does not guarantee that liability will ultimately be apportioned according to fault, it does strengthen a defendant's incentive to settle. Furthermore, the plaintiff remains the master of his fate and, having made the decision to settle, will absorb no more of the risk of loss than that for which he bargained.[94] Of course, because the set-

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provision of section (d) for reallocation. This provision takes effect when the share of any party is uncollectible. The comments to section 2 suggest that the reallocation provision avoids the inequities of forcing the risk of uncollectibility either upon the defendant or upon the plaintiff.

[91] *See* Wade, *supra* note 6, at 702.

[92] 288 So. 2d 846 (Miss. 1974).

[93] *Id.* at 848-49.

[94] One arguable advantage of this system is that it encourages the claimant to actually assess a particular tortfeasor's ability to pay before settling. Indeed the risk of an unsound settlement falls upon the settling plaintiff rather than the other defendants. Pearson, *supra* note 3, at 371.

Another commentator has suggeted a modification of such a system, involving an approach similar to that used to apportion the liability of an insolvent tortfeasor under

tling party cannot be a joint judgment debtor,[95] he cannot receive contribution from other tortfeasors. Likewise the other joint tortfeasors who have settled, or who have had a judgment rendered against them, have no rights to contribution from the settling joint tortfeasor.[96] Joint and several liability is still at the disposal of the injured or damaged plaintiff to aid him in recovery for his loss. Furthermore, the "entirely liable" tortfeasor can seek contribution against anyone else adjudged

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the Uniform Comparative Fault Act. Under this modified scheme, the share of the settling tortfeasor's liability which is greater than the settlement amount is apportioned among each party at fault including the claimant. Assume, for example, that the parties in our malfunctioning air conditioner situation share in the liability as follows: Claimant 10%, tortfeasor A 50%, and tortfeasor B 40%. If judgment is for $200,000, then A's share would amount to $100,000. But, if A had previously settled for $80,000, a $20,000 defecit would lie with the claimant and remaining defendant. Of course, under the doctrine of joint and several liability, B could be required to pay his $80,000 (40% of $200,000) plus the $20,000 deficit avoided by A through his settlement. Apportioning the $20,000 deficit between the claimant and defendant B, however, would seem most equitable and would encourage settlement by both claimants and defendants. Because the ratio of B's liability to claimant's liability is 4 to 1 (40% to 10%), B would have to pay $16,000 of the deficit (4/5ths of $20,000), and the claimant would have to absorb the remaining $4,000 (1/5th of $20,000). Miller, *Extending the Fairness Principle of* Li *and* American Motorcycle*: Adoption of the Uniform Comparative Fault Act*, 14 Pac. L.J. 835, 866-67 n.173 (1983).

[95] *See* Miss. Code Ann. § 85-5-5 (1972).

[96] *See* Wilson v. Giordano Ins. Agency, Inc., 475 So. 2d 414, 417 (Miss. 1985). In this recent opinion, the Mississippi Supreme Court held that a mortgagee, whose negligence, combined with that of an insurance company, allegedly contributed to cancellation of a flood insurance policy, was a "joint-tortfeasor and thus could not settle with the injured party and then seek contribution from the insurance company." *Id.*

Note also that the following provision of the Mississippi Code details the effect of releasing one or more joint debtors:

> In all cases of joint or joint and several indebtedness, the creditor may settle or compromise with and release any one or more of such debtors; and the settlement or release shall not affect the right or remedy of the creditor against the other debtors for the amount remaining due and unpaid, and shall not operate to release any of the others of the said debtors; and all mortgages or securities for the said indebtedness shall remain in full force against the debtors not released, in favor of the creditor, and also in favor of such of the debtors as may be entitled to contribution, payment, or reimbursement from others of said debtors, and the right of payment, contribution or reimbursement, as among themselves, shall not be affected by this section; and if any debtor, so released, shall have paid more than his ratable share of the whole debt, the whole amount paid by him shall be credited, and if less than his ratable share, then the full amount of his ratable share shall be credited, and the other debtors shall be liable for the residue.

Miss. Code Ann. § 85-5-1 (1972).

liable.[97] Certainly, in considering rules for apportionment of loss in Mississippi, the system should provide the most equitable scheme, encouraging both plaintiffs and defendants to settle if possible.

Under a pure comparative negligence system, such as that in place in Mississippi, "set-off" problems may arise no matter how the fault is apportioned.[98] While the adoption of Rule 13 of the Mississippi Rules of Civil Procedure has been of great service in removing the idiosyncratic differences between recoupment, statutory set-off, and equitable set-off, the question of whether to permit these kinds of remedies still remains. The greatest problem seems to arise when liability insurance will cover a claim for damages.[99] Another hypothetical will help to illustrate the problems which may arise. Suppose a situation in which an accident has caused $50,000 in damages to *A* and $25,000 in damages to *B*. *A* is 50% at fault and *B* is 50% at fault. Applying the normal rules of set-off, the recovery by *A* would be computed by reducing his damages by 50% to $25,000 and subtracting $12,500 (the amount that *B* would otherwise be entitled to; $25,000 reduced by 50%) to reach a net judgment of $12,500 in favor of *A*. If *A* or *B* were insured against liability, however, the effect of the set-off would be to benefit the insurer at the expense of the insured.[100] Several methods have been suggested[101] which would avoid this result, including the total prohibition

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[97] Miller, *supra* note 94, at 865-66.

[98] Pearson, *supra* note 3, at 358 n.62.

In the 1872 case of Myers v. Estelle, 47 Miss. 4 (1872), set-off was distinguished from recoupment in three particulars: (1) set-off generally arises out of matters extrinsic to the plaintiff's cause of action, while recoupment is confined to matters arising out of and connected with the transaction upon which the plaintiff's suit was brought; (2) set-off is not permitted for unliquidated tort damages, but recoupment gives no regard to whether a matter was liquidated or unliquidated; (3) the right of set-off at law is purely statutory, yet the recoupment remedy is not subject to statutory regulation. *Id.* at 23.

[99] Pearson, *supra* note 3, at 358.

[100] *Id.*

[101] Set-off could be permitted except to the extent that the liability insurer would benefit from it. James, *Connecticut's Comparative Negligence Statute: An Analysis of Some Problems*, 6 CONN. L. REV. 207, 222 (1973-74). A variation on this was suggested by Dean Wade in a discussion of what the Uniform Comparative Fault Act should provide:

> If there is no liability insurance, set-off of counterclaims, as they are determined under this Act, takes place. If liability insurance is available to cover both claims, no set-off takes place. If liability insurance is carried by only one party (called the insured party), the insurance company shall, within the limits of its obligation to the uninsured party, instead pay to the insured party the amount for which the uninsured party is liable to the insured party. This payment then satisfies, completely or partially, the insurance company's obligation to the uninsured party and extinguishes, up to its amount, the counterclaims between the two parties.

of set-off in comparative fault cases.[102]

Mississippi's approach to set-off and recoupment has been quite traditional. In *Johnson v. Richardson*,[103] the Mississippi Supreme Court rejected the contention that the Mississippi statute[104] permitting such recoupment claims was in conflict with Mississippi's scheme of comparative negligence.[105] Revision of the Mississippi scheme of set-off would, however, produce more equitable results in those situations where problems now seem to arise.

V. The Effect of Immunities Upon Loss Apportionment in Mississippi

Any discussion of immunities in the state of Mississippi should naturally begin with the immunity of state and political subdivisions from liability for torts of the governmental body and its employees.[106] While there are many other statutorily provided immunities which may also raise problems with regard to allocation of loss between joint tortfeasors,[107] the focus of this discussion will center upon sovereign

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Wade, *A Uniform Comparative Fault Act—What Should it Provide?*, 10 U. Mich. J.L. Ref. 220, 230 (1977).

[102] Avoidance of the inequitable result arising when insurers are involved has been addressed by prohibiting set-off in comparative negligence actions. *See* R.I. Gen. Laws § 9-20-4.1 (1985); Or. Rev. Stat. § 18.490 (1985). The Uniform Comparative Fault Act as finally adopted does prohibit set-off, but seems to provide a method whereby the inequities noted earlier can be avoided. Section 3 of the Act states:

> A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

Uniform Comparative Fault Act § 3, 12 U.L.A. 45 (Supp. 1985).

[103] 234 Miss. 849, 108 So. 2d 194 (1959).

[104] Miss. Code Ann. § 1483.5 (1942)(recodified as Miss. Code Ann. § 11-7-69 (1972)).

[105] *Johnson*, 234 Miss. at 859-61, 108 So. 2d at 199.

[106] Miss. Code Ann. §§ 11-46-1 to -21 (Supp. 1985).

[107] Sections of the Mississippi Code provide for a plethora of varying immunities, including the following: § 25-4-17 (immunity for public officers acting in reliance upon Ethics Commission advisory opinions); § 41-73-59 (Hospital Equipment Financing Authority; immunity from liability); § 43-21-355 (immunity from liability for officer or official participating in judicial proceeding); § 63-3-405 (tort immunity for person rendering assistance at motor vehicle accident); § 73-19-5 (optometrist's immunity from civil liability).

Major immunity problems also arise between employers and employees in Missis-

immunity. Mississippi's sovereign immunity statutes[108] effectively overrule the Mississippi Supreme Court's decision in *Pruett v. City of Rosedale*,[109] which had prospectively abolished judicially created sovereign immunity.[110] Prior to *Pruett*, sovereign immunity had been held applicable to all tort actions against the state and its political subdivisions.[111] The new statute, for all intents and purposes, reinstates sovereign immunity with certain exceptions.[112]

Since we do not know how long the Mississippi Legislature will maintain its stranglehold upon the doctrine of sovereign immunity,[113] it is particularly important to understand how such an immunity affects apportionment of loss among joint tortfeasors. Again a factual example will help the analysis. In *McKay v. Boyd Construction Co.*,[114] a negligence action was brought against the Mississippi Highway Department and the private contractor which had constructed a state bridge. The plaintiff sustained serious injuries when the car in which he was riding struck the abutment of a bridge placed only twenty-three inches from the lane of traffic.[115] For purposes of illustration, let's assume that the Highway Department is indeed the proper party to sue and that the Highway Commission was not involved.[116] Because the High-

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sippi as provided in Mississippi's Workers' Compensation Provisions. *See* MISS. CODE ANN. §§ 71-3-1 to -111 (1972).

[108] MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1985).

[109] 421 So. 2d 1046 (Miss. 1982).

[110] *Id.* at 1052.

[111] McKlemurry v. University Medical Center, 380 So. 2d 251, 251 (Miss. 1980). The supreme court had suggested several times that although much was to be said in support of the abrogation of the doctrine of sovereign immunity, the legislature was the proper branch of government to strike the doctrine and provide the means of paying claims. Jones v. Knight, 373 So. 2d 254, 256-58 (1979); Berry v. Hinds County, 344 So. 2d 146, 150-51 (1977).

[112] MISS. CODE ANN. § 11-46-5 (Supp. 1985). The remedies provided for are exclusive of all other civil actions. *Id.* at § 11-46-7.

[113] It is most important to keep in mind that a state's waiver of immunity in its own courts is not treated as a waiver of its eleventh amendment immunity in the federal court system. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 n.9 (1984); Florida Dep't of Health v. Florida Nursing Home Assoc., 450 U.S. 147, 150 (1981). Indeed it has been held that the language of Mississippi's most recent immunity statutes, particularly § 11-46-5(4), clearly reveals that Mississippi does not intend to waive its eleventh amendment immunity. Brady v. Michelin Reifenwerke, 613 F. Supp. 1076, 1081 (S.D. Miss. 1985).

[114] 769 F.2d 1084 (5th Cir. 1985).

[115] *Id.* at 1085-86. The bridge was constructed by the contractor in accordance with specifications approved by the Federal Bureau of Public Roads and prepared by the Mississippi State Highway Commission. *Id.* at 1085.

[116] The plaintiff sued Boyd, the private contractor, and the Highway Department.

way Department is immune from such suits,[117] a special problem arises with respect to the question of who should bear the loss attributable to the negligence of that immune tortfeasor. Obviously the loss must somehow be apportioned between the plaintiff and the remaining defendant(s).

The comments to section 6 of the Comparative Fault Act suggest that the immune tortfeasor could be treated as a released tortfeasor under section 6 of the Act—his equitable share of the responsibility would be determined by the court and subtracted from the sum of the plaintiff's recovery.[118] This would of course cause the loss to be borne entirely by the plaintiff. One author has suggested that this is indeed the most equitable result because of the relationship between the immune defendant and the plaintiff.[119] The reasoning is that because of the relationship between the particular defendant and the plaintiff, the latter should not recover and comparative negligence should not "permit the plaintiff to avoid the consequences of that relationship by shifting all or part of the loss to the non-immune persons."[120] This approach would, in the *McKay* example, place the whole burden upon the injured car passenger.[121]

Yet another possibility would be to allocate the immune party's share of the fault among all of the remaining parties at fault. This would be carried out in a manner similar to the reallocation provisions of the Uniform Comparative Fault Act.[122] While the comments to the Act[123] suggest that the same result would be "accomplished by leaving the immune party out of the action altogether," it is certainly possible that non-immune defendants are slightly more prejudiced when the

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Mississippi has not authorized actions in tort against the Highway Department. *Id.* at 1086. Suits have been statutorily authorized, however, against the Highway Commission pursuant to Miss. Code Ann. § 65-1-8 (Supp. 1984). Because the Commission treated the naming of the Highway Department as merely a misnomer, and vigorously defended the suit from its beginning, the Fifth Circuit Court of Appeals found the claim to be nonspecious. *McKay*, 769 F.2d at 1087.

[117] *See supra* note 116.

[118] Uniform Comparative Fault Act § 6 comment, 12 U.L.A. 49 (Supp. 1985). The Act makes no provision for immunities. *Id.*

[119] Pearson, *supra* note 3, at 367.

[120] *Id.*

[121] A quick analysis, however, would suggest that because the immune party will not be before the court, the jury will more often than not return a verdict against the non-immune defendant for an amount greater than they would have had the joint tortfeasor not been immune. Thus the loss is actually greater for the non-immune defendant because of his increased exposure.

[122] *See supra* note 90.

[123] Uniform Comparative Fault Act § 6 comment, 12 U.L.A. 49 (Supp. 1985).

immune tortfeasor is ignored altogether than when the loss is allocated as in section 2(d) of the Act.[124] Another proposed solution to the problem of apportioning the loss attributable to an immune tortfeasor would hinge on whether the immunity was total—that is, running in favor of the tortfeasor against all parties, or merely a limited immunity extending from a particular tortfeasor to a particular defendant.[125] Indeed, because various kinds of immunities exist, there may be no single totally fair method of spreading the loss attributable to the immune tortfeasor.[126] The most that can be said with regard to the problems presented by the presence of immunities is that the practitioner in Mississippi should maintain keen awareness of the possibility that one party may be immune from suit, and that the portion of fault otherwise imposed upon that party must be borne by one or all of the remaining parties to a suit.

VI. Conclusion

Cases will of course arise where a sole, solvent tortfeasor has caused injury or damage to a sole, blameless individual whose legal recourse is, because of the circumstances, marked by clear lines of substantive and procedural rules. This is not always true, however, particularly in view of the factual surroundings of many torts, and plaintiffs' general tendency to be generous with their processes. Certainly in a system where multiple defendants are commonplace and plaintiffs are occasionally themselves partially at fault, responsibility for injury and damage should be borne by those who share in the fault in "proportion to their respective fault."[127] The goal of equitably apportioning respon-

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[124] *See supra* note 121.

[125] Pearson, *supra* note 3, at 367. In the former instance, if the plaintiff were responsible for any portion of the loss, the immune tortfeasor's share would be apportioned among all remaining parties. In the case of the latter and more limited immunity, such as interfamily tort immunity, the plaintiff alone would "theoretically" bear the loss. *Id.*

[126] Furthermore, because contribution is not available except between joint judgment debtors pursuant to Miss. Code Ann. § 85-5-5 (1972), the immunity of the tortfeasor may not be circumvented by permitting contribution.

Although the problems which may arise when an insured employee is entitled to workers' compensation benefits will not be textually discussed, parties to a suit arising from an employment-related injury should remain aware of the provisions in Miss. Code Ann. §§ 71-3-1 to -111 (Supp. 1985). Tort actions brought against third parties, other than the employer, may raise special problems with regard to apportionment of loss in proportion to fault. *See* Uniform Comparative Fault Act § 6 comment, 12 U.L.A. 49 (Supp. 1985)(discussion of problems that may arise when workers' compensation statutes apply to one joint tortfeasor).

[127] Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864

sibility and liability in relation to the degree of fault of a party, which underlies the "pure" comparative fault scheme, is in many respects thwarted by Mississippi's legislative and judicial rules.

Mississippi's contribution statute[128] clearly presents a couple of obstacles to the fair and just apportionment of the obligation for a joint tort. First, the "joint judgment" limitation fails to provide justice for all. Abrogation of the "joint judgment" limitation will not affect a plaintiff's ability to choose his defendants,[129] but will serve to apportion the liability more equitably among those actually responsible for the harm. Furthermore, the method for ascertaining the proper measure of contribution and establishing the ultimate responsibility in Mississippi is a pro-rata apportionment scheme.[130] Because responsibility for the harm caused is to be apportioned among the parties at fault in a comparative fault system, it is only sound to observe rules of contribution which determine a tortfeasor's contribution liability on a basis of proportionate fault. Obviously Mississippi's contribution scheme is in need of significant statutory surgery—the sooner the better.[131]

Mississippi's lack of a third-party practice rule[132] likewise hinders the objective of ensuring that responsibility for a tort will ultimately rest upon the tortfeasors in relation to their proportionate fault. The Mississippi Supreme court has expressed its concern for the prevention of multiple suits when one action will suffice.[133] Yet the court has refused to adopt perhaps the most helpful tool in this regard—third-party practice. Reconsideration of the utility of the impleader tool is imperative in order to prevent the unnecessary waste of a litigant's time and money, and to avoid the needless circuity of action which is necessary without it. Moreover, the vouching-in provisions of section 75-2-607(5)(a), if effectively used, will help to provide a more just apportionment of fault.[134]

Comparative fault principles would be further advanced if Mississippi were to permit the allocation by juries, possibly through the use

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(1975).

[128] MISS. CODE ANN. § 85-5-5 (1972).

[129] It is possible that plaintiffs may also be aided in their search for recovery by permitting contribution even though judgment has not been rendered against a tortfeasor. The possibility of becoming subject to a future suit for contribution will likely promote more generous settlements on behalf of potential defendants.

[130] *See supra* text accompanying note 53.

[131] *See generally* Allen, *supra* note 46, at 55-63 (advocating unlimited contribution in Mississippi).

[132] *See supra* note 63 and accompanying text.

[133] Magee v. Griffin, 345 So. 2d 1027, 1032 (Miss. 1977).

[134] *See supra* notes 73-82 and accompanying text.

of special verdicts, of the percentages of fault attributable to each multiple defendant. As noted earlier, such a scheme would not adversely affect common-law rules of joint and several liability,[135] yet would help to make certain that responsibility for a particular tort rests ultimately upon the defendants in proportion to their respective fault. A closer analysis by Mississippi's bar, bench, and legislature may also reveal that some fine tuning is in order with regard to release, settlement, set-off, recoupment, and immunities, and their relation to the "pure" form of comparative fault in place in the state. Logic and fairness suggest that the substantive and procedural rules in Mississippi, which bear upon the concept of liability in proportion to fault, should be carefully designed to foster the objectives of the comparative fault system. Although some complicated matters of fact and points of law must be addressed, the concerns of fairness in apportioning fault should not be ignored "for the sake of consistency" or convenience alone.

Perhaps the inconsistencies in Mississippi's rules bearing upon apportionment of fault have resulted from the "influence of special interest groups" producing inapposite and unfortunate compromises.[136] The carefully and impartially drafted Uniform Comparative Fault Act[137] endeavors to unearth the important questions concerning comparative fault. Its balanced approach to apportionment and reallocation of damages,[138] set-off,[139] contribution,[140] and release,[141] presents an innately fair system of apportioning liability according to the degree of fault. The Act could serve very well as a model upon which an even fairer scheme of loss apportionment could be fashioned for Mississippi. A comprehensive approach to the issue of loss apportionment in a comparative fault system such as ours will ensure that fairness will be afforded to all who find themselves as litigants to a tort claim in Mississippi.

H. Richmond Culp III

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[135] *See supra* text accompanying note 53.
[136] Wade, *supra* note 101, at 221-22.
[137] UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. 39 (Supp. 1985).
[138] *Id.* § 2, 12 U.L.A. 43.
[139] *Id.* § 3, 12 U.L.A. 45.
[140] *Id.* §§ 4, 5, 12 U.L.A. 46, 47.
[141] *Id.* § 6, 12 U.L.A. 48.

1985 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

In 1985, the Mississippi Supreme Court rendered numerous decisions in the area of administrative law.[1] Cases receiving textual treat-

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[1] Supreme Court decisions not receiving textual discussion include (1) *Access to Public Records*: Roberts v. Mississippi Republican Party State Executive Comm'n, 465 So. 2d 1050, 1054 (Miss. 1985)(fee charged by Department of Public Safety for providing list of Mississippi driver's license records must be limited to actual cost of providing copies of records); (2) *Annexation*: Western Line Consol. School Dist. v. City of Greenville, 465 So. 2d 1057, 1061 (Miss. 1985)(en banc)(determination of reasonableness of proposed municipal annexation is judicial function and is not ministerial in nature); (3) *Attorney Misconduct*: Pitts v. Mississippi State Bar Ass'n, 462 So. 2d 340, 343 (Miss. 1985)(en banc)(sanctions against attorneys serve to punish wrongdoer, to deter further violations by immediate offender and general public, and to reinforce general public's confidence in ability of society to govern itself); *In re* Garner, 466 So. 2d 884, 885, 887 (Miss. 1985)(willful misconduct in judicial office, necessary to warrant removal from office, is conduct prejudicial to administration of justice which brings judicial office into disrepute; willful misconduct may consist of negligence or ignorance not amounting to bad faith); Sanders v. Mississippi State Bar Ass'n, 466 So. 2d 891, 895 (Miss. 1985)(county attorney has engaged in improper conduct when in his private practice he engages in representation which potentially and foreseeably conflicts with his prosecutorial responsibility), *cert. denied*, 106 S. Ct. 133, 133 (1985); Clark v. Mississippi State Bar Ass'n, 471 So. 2d 352, 356-57 (Miss. 1985)(en banc)(delay in instigation of disciplinary proceedings against attorney does not operate as bar to such proceedings absent showing that delay resulted in prejudice to attorney; restitution of funds previously misappropriated by attorney does not mitigate offense where restitution is made under pressure); A Miss. Attorney v. Mississippi State Bar Ass'n, 471 So. 2d 1230, 1233-34 (Miss. 1985)(attorney charged with ethical violation under consideration of Complaints Committee is entitled to fair notice of charge against him; due process demands that defendant be given opportunity to defend himself at formal hearing against charge of unethical conduct); Myers v. Mississippi State Bar Ass'n, 480 So. 2d 1081, 1087 (Miss. 1985)(attorney subject to complaints investigation is entitled to due process rights of confrontation and cross-examination of his accusors, to offer witnesses on his own behalf, and to proof of charges against him by clear and convincing evidence); Smith v. Mississippi State Bar Ass'n, 475 So. 2d 148, 149 (Miss. 1985)(there is no constitutional or stat-

ment involve decisions in which the supreme court broadened the area

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utory provision authorizing appeal from dismissal of complaint filed against attorney before Mississippi State Bar Committee on Complaints); Mississippi State Bar Ass'n v. Attorney A, 475 So. 2d 1164, 1165 (Miss. 1985)(attorney may not be suspended from practice of law solely for being convicted of contempt, even though conviction may have arisen from attorney's misrepresentation to court of law); An Attorney v. Mississippi State Bar Ass'n, 478 So. 2d 289, 290-91 (Miss. 1985)(attorney who refers his client's personal injury claim to another attorney is not guilty of unprofessional conduct for failure to honor assignment of that claim when his client informs him assignment is forged); An Attorney v. Mississippi State Bar Ass'n, 478 So. 2d 292, 292 (Miss. 1985)(attorney who receives referral of personal injury claim by another attorney is not guilty of unprofessional conduct for failure to honor assignment of that claim when client informs him assignment is forgery); An Attorney v. Mississippi State Bar Ass'n, Conf. Misc., 481 So. 2d 297, 300-01 (Miss. 1985), (finding of civil trespass committed by attorney, established by clear and convincing evidence, warrants private reprimand); United Cos. Mortgage Inc. v. Jones, 465 So. 2d 1083, 1084 (Miss. 1985)(where complaint frames issues as case of negligence, six-year statute of limitations is applicable to legal malpractice actions); (4) *Auditor of Public Accounts*: Mississippi State Bldg. Comm'n v. S & S Moving, Inc., 475 So. 2d 159, 162 (Miss. 1985)(statute requiring any person with claim against state to seek relief from Auditor of Public Accounts prior to bringing suit is not applicable to actions for breach of contract); (5) *Board of Nursing*: Mississippi Bd. of Nursing v. Belk, 481 So. 2d 826, 830-81 (Miss. 1985)(grandfather clause which allows nurse anesthetists to avoid certification requirements is unconstitutional as violative of equal protection when it includes time limitation and no such limitation is included in grandfather clause for registered nurses); (6) *Education*: Board of Trustees v. Gates, 467 So. 2d 216, 219 (Miss. 1985)(en banc)(since municipal school board is agency of state, payment of appeal bond premium by such board is unnecessary); Noxubee County Bd. of Educ. v. Givens, 481 So. 2d 816, 819 (Miss. 1985)(although school board is charged with making ultimate employment decisions in all teacher dismissal and non-renewal cases, chancery court, and ultimately supreme court, have responsibility to intervene); Noxubee County Bd. of Educ. v. Overton, 483 So. 2d 301, 303 (Miss. 1985)(failure of board of education to schedule hearing regarding teacher's non-reemployment within thirty days of notice of non-reemployment does not automatically renew contract for following year); Flowers v. Stone County Bd. of Educ., 469 So. 2d 1261, 1261 (Miss. 1985)(teacher's right to have decision not to renew his contract reviewed is controlled by MISS. CODE ANN. §§ 37-9-101 to -113); (7) *Elections*: Naron v. Prestage, 469 So. 2d 83, 87 (Miss. 1985)(offer by candidate for election to enter names of voters into cash-prize drawing, where voters are not required to vote for sponsoring candidate, is not illegal); (8) *Employment*: Warren v. Board of Review, 463 So. 2d 1076, 1077 (Miss. 1985)(MISS. CODE ANN § 71-5-513(A)(1)(a), disqualifying from unemployment benefits individuals who leave work for marital reasons, is constitutional); Piggly Wiggly v. Mississippi Employment Sec. Comm'n, 465 So. 2d 1065, 1065 (Miss. 1985)(findings of Employment Security Commission Board of Review shall be conclusive if supported by evidence, and jurisdiction of court of review shall be limited to questions of law); City of Laurel v. Samuels, 469 So. 2d 530, 532 (Miss. 1985)(municipalities which establish civil service systems under MISS. CODE ANN. §§ 21-31-1 to -27 are not permitted thereby to avoid civil service requirements set forth in MISS. CODE ANN. §§ 21-31-51 to -75); Roberts v. Troutt, 475 So. 2d 421, 423 (Miss. 1985)(where there is only unilateral expectation of retention of employment, there arises no property interest in that employment and no right to due process in removal or retention); Shaw v.

Burchfield, 481 So. 2d 247, 252-53 (Miss. 1985)(where termination notice given to employee complies with his unambiguous employment contract, contract will be enforced as written); Robinson v. Board of Trustees of East Cent. Junior College, 477 So. 2d 1352, 1353 (Miss. 1985)(employer who uses and disseminates employment handbooks and manuals is bound by provisions contained therein where contract of employment requires employee to perform his duties in accordance with policies of employer); (9) *Public Service Commission*: Mississippi Pub. Ser. Comm'n v. Municipal Energy Agency, 463 So. 2d 1056, 1058-59 (Miss. 1985)(en banc)(agencies consisting of two or more municipalities established for purpose of jointly owning and operating facilities for generation and transmission of electric power and energy are exempt from obtaining certificate of public necessity and convenience from Mississippi Public Service Commission prior to construction of those facilities); State of Miss. *ex rel.* Pittman v. Mississippi Pub. Ser. Comm'n, 481 So. 2d 302, 305 (Miss. 1985) (rulings by Public Service Commission which have not ignored salient and substantial factors offered into evidence cannot be disturbed on appeal; commission is trier of facts and has right to determine weight of evidence, reliability of estimates and credibility of witnesses); (10) *Taxes*: Triangle Refineries, Inc. v. Mabus, 467 So. 2d 650, 651-52 (Miss. 1985)(to qualify for tax exemptions, gasoline distributor must file for refund of taxes within one year from date of sale of delivery; taxes retained by state, due to distributor's failure to file timely for refund, were not erroneously or illegally collected); *In re* Validation of $7,800,000 Combined Util. Sys. Revenue Bond and White v. Gautier Util. Dist., 465 So. 2d 1003, 1018-19 (Miss. 1985)(subsequent to validation decree of bond issue, taxpayers may not be heard to complain of legality or constitutionality of any facet of bond issue or project if scope of validation proceeding encompassed particular issue in controversy); Mississippi State Tax Comm'n v. Elks Lodge No. 553, 471 So. 2d 1225, 1226-27 (Miss. 1985)(State Tax Commission has duty to hear cases that involve alleged gambling devices in premises under license to sell or distribute alcoholic liquors and is authorized to issue subpoenas requiring attendance of witnesses and production of books and records); W.H. Hopper & Assocs., Inc. v. DeSoto County, Miss., 475 So. 2d 1149, 1152 (Miss. 1985)(local taxing authority has burden of proof in action to recover taxes allegedly due and unpaid); (11) *Workers' Compensation*: Piggly Wiggly v. Houston, 464 So. 2d 510, 513 (Miss. 1985)(one hundred percent industrial disability of scheduled member can result from only partial functional disability of that member, so long as worker is prevented by injury from performing substantial acts required of him in his business); Clark v. Winston County Community Hosp. & Nursing Home, 464 So. 2d 523, 523 (Miss. 1985)(political subdivisions may elect not to be subject to provisions of workers' compensation statute); Parrott v. Winston County Hosp. & Nursing Home, 464 So. 2d 1159, 1160-61 (Miss. 1985)(same); Hall of Miss., Inc. v. Green, 467 So. 2d 935, 938 (Miss. 1985)(disability for workers' compensation purposes need not be proved by medical testimony so long as there is medical testimony which will support finding of disability); South Cent. Bell v. Adam, 474 So. 2d 584, 596 (Miss. 1985)(employer is not entitled to credit against future weekly payments owed to claimant under workers' compensation for amounts in excess of amount required by law paid previously under company benefit plan); Olen Burrage Trucking Co. v. Chandler, 475 So. 2d 437, 439 (Miss. 1985)(factual findings of Workers' Compensation Commission, when based on substantial credible evidence, are not to be disturbed); Litton Systems, Inc. v. Sloan, 480 So. 2d 1117, 1118-19 (Miss. 1985)(special regards exception to coming and going rule allows employee to receive compensation benefits when she is injured by some hazard inherent in conditions along route necessarily used; to rebut, employer must show employee had practical alternative route to avoid inherent danger); Luckett v. Mississippi

of compensation to workers receiving mental injuries,[2] decisions limiting tort immunity to prime contractors,[3] a decision expanding the effect of res judicata in workers' compensation cases,[4] a decision expanding the power of school districts to punish students,[5] a decision applying municipal zoning ordinances to school districts,[6] and a decision applying the open meetings law to the Board of Trustees of State Institutions of Higher Learning.[7]

I. Workers' Compensation

A. Compensation for Mental Injuries

In determining whether a mental injury is compensable, the crucial issue is whether the injury arose out of and in the course of employment.[8] Where a covered accident causes a physical injury, and where emotional trauma accompanies physical injury, the mental disability is compensable.[9] The causal connection between the accident and the infirmity must, however, be established by clear evidence.[10] This

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Wood, Inc., 481 So. 2d 288, 289-90 (Miss. 1985) (pleading which asserted intentional bad faith and malicious refusal to pay workers' compensation benefits is within circuit court's jurisdiction); (12) *Zoning*: City of Jackson v. Wheatley Place, Inc., 468 So. 2d 81, 83 (Miss. 1985)(to justify rezoning, applicant must prove either (1) that there was mistake in original zoning, or (2) that character of neighborhood had changed to such extent as to justify rezoning, and that public need existed for rezoning); Northwest Builders, Inc. v. Moore, 475 So. 2d 153, 156 (Miss. 1985)(to defeat decision to rezone, those challenging decision have burden of affirmatively showing that decision to rezone was arbitrary, capricious, discriminatory, or illegal).

[2] Smith & Sanders, Inc. v. Peery, 473 So. 2d 423 (Miss. 1985); Brown & Root Constr. Co. v. Duckworth, 475 So. 2d 813 (Miss. 1985); *see infra* notes 12-30 and accompanying text.

[3] Falls v. Mississippi Power & Light Co., 477 So. 2d 254 (Miss. 1985); Nash v. Damson Oil Corp., 480 So. 2d 1095 (Miss. 1985); *see infra* notes 35-64 and accompanying text.

[4] Aetna Casualty & Sur. Co. v. Espinosa, 469 So. 2d 64 (Miss. 1985); *see infra* notes 68-84 and accompanying text.

[5] Clinton Mun. Separate School Dist. v. Byrd, 477 So. 2d 237 (Miss. 1985); *see infra* notes 89-104 and accompanying text.

[6] Robinson v. Indianola Mun. Separate School Dist., 467 So. 2d 911 (Miss. 1985); *see infra* notes 105-18 and accompanying text.

[7] Board of Trustees of State Insts. of Higher Learning v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985); *see infra* notes 119-29 and accompanying text.

[8] *See* Miss. Code Ann. § 71-3-7 (1972). Section 71-3-7 provides: "Compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment . . . ."

[9] Miller Transp., Ltd. v. Reeves, 195 So. 2d 95, 100 (Miss. 1967). *See generally* V. Dunn, Workmen's Compensation § 114 (3d ed. 1982) [hereinafter cited as V. Dunn]

[10] Miller Transp., Ltd. v. Reeves, 195 So. 2d 95, 100 (Miss. 1967); Merchants Co. v.

stringent burden of proof is imposed because of the suspicion which naturally accompanies emotional injuries.[11]

In *Smith & Sanders, Inc. v. Peery*,[12] the Mississippi Supreme Court established the burden of proof required of employees who claim benefits for mental injury unaccompanied by physical trauma. In order to receive compensation, the employee must show that his mental injury is directly linked to his employment by some "untoward event, unusual occurrence, accident or injury."[13] In establishing this heavy burden, the court recognized the suspicion which accompanies mental injuries and emphasized the greater burden of proof the employee bears in claims of mental disease.[14] The court noted that termination is a normal risk of employment and is not an untoward event or unusual occurrence and denied benefits to an employee who suffered a "nervous breakdown" upon being informed he was being laid off.[15]

Subsequently, in *Brown & Root Construction Co. v. Duckworth*,[16] the court awarded compensation to an employee who suffered "an hysterical conversion reaction" upon discovering he would never receive the promotion he had been promised.[17] The court cited *Smith & Sanders, Inc. v. Peery*[18] for the proposition that under appropriate circumstances an employee can be compensated for mental or nervous injuries not immediately caused by physical trauma.[19] The court noted that the difficulty lies in establishing the requisite causal connection between the work and the "injury."[20] However, the court held that substantial credible evidence supported a finding by the Workers' Compensation Commission that the mental injury suffered by the employee was related to some untoward event, unusual occurrence, accident, or injury incident to the employment.[21]

Factually, the two cases are difficult to distinguish. It seems the court could have reasoned in *Duckworth*, as it did in *Peery*, that the

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Moore, 197 So. 2d 791, 793 (Miss. 1967); National Impact Metal Corp. v. Huffstatler, 184 So. 2d 877, 877 (Miss. 1966); Powers v. Armstrong Tire & Rubber Co., 252 Miss. 717, 723, 173 So. 2d 670, 672 (1965). *See generally* V. DUNN, *supra* note 9, § 114.

[11] V. DUNN, *supra* note 9, § 114.

[12] 473 So. 2d 423 (Miss. 1985).

[13] *Id.* at 426.

[14] *Id.* at 425.

[15] *Id.* at 426.

[16] 475 So. 2d 813 (Miss. 1985).

[17] *Id.* at 816.

[18] 473 So. 2d 423 (Miss. 1985).

[19] *Duckworth*, 475 So. 2d at 815.

[20] *Id.*

[21] *Id.*

failure to receive a promotion was a normal risk of employment.[22] However, considering the cases from a "standpoint of review" viewpoint, the cases are much easier to reconcile. In *Duckworth*, the court noted that to overturn a finding of compensability by the Commission, the court must rule that the finding was not supported by substantial credible evidence.[23] The court stated it was unable to so rule and, accordingly, upheld the Commission's finding of compensability.[24] On the other hand, the finding of the Commission in *Peery* was one denying compensation.[25] Again, the court found that the Commission's finding was supported by substantial credible evidence and likewise affirmed that decision.[26]

These decisions by the court seem to have two effects. First, a standard for compensating mental injuries which do not accompany physical injuries has been established.[27] Second, the court has, in essence, given the Commission almost total responsibility in deciding these cases by showing great deference to the Commission's "factual" determinations of whether the mental injury was linked to some untoward event or unusual occurrence.[28] The effect of such action is that the Commission's factual determinations in each case will be subject only to cursory review by the court.[29] One can only hope that this will result in the Commission's careful scrutiny of "mental injury."[30]

B. Statutory Employer—Inroads Against Doubleday

In exchange for securing workers' compensation coverage, a claimant's employer is immune from tort suits brought by the claimant.[31] Additionally, a contractor becomes liable for compensation to the employees of his subcontractor in the event the subcontractor does not

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[22] *See supra* text accompanying note 15.

[23] *See supra* text accompanying note 21; *see also* Myles v. Rockwell Int'l, 445 So. 2d 528, 536 (Miss. 1983)(standard of review of findings of commission).

[24] *See supra* text accompanying note 21.

[25] *Peevy*, 473 So. 2d at 425.

[26] *Id.* at 426.

[27] *See supra* text accompanying note 13.

[28] *See supra* text accompanying notes 23-26.

[29] *See* Myles v. Rockwell Int'l, 445 So. 2d 528, 536 (Miss. 1983)(standard of review of findings of commission).

[30] *See supra* text accompanying notes 11 and 14.

[31] MISS. CODE ANN. § 71-3-9 (1972). Section 71-3-9 provides: "The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . . ." *Id.; see also* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.10 (1982)[hereinafter cited as A. LARSON].

secure coverage.[32] In *Doubleday v. Boyd Construction Co.*, [33] the court interpreted the two rules collectively and held that where a contractor requires his subcontractors to provide compensation coverage for the subcontractor's employees, the contractor, by his good deed, becomes a statutory employer and is afforded immunity from an action at common law brought by an employee of the subcontractor.[34]

However, in *Falls v. Mississippi Power & Light Co.*,[35] the court limited the reach of this immunity.[36] Falls, an employee of Deviney Co., was electrocuted while trimming trees around power lines belonging to Mississippi Power & Light (MP&L).[37] The power lines were constructed pursuant to a "special use permit" obtained by MP&L from the National Park Service.[38] Falls' dependents sued MP&L at common law, whereupon MP&L claimed immunity, arguing it was a contractor by virtue of the special use permit.[39] The court denied immunity to MP&L and held that the special use permit did not establish MP&L as a general or prime contractor, or Deviney Company as its subcontractor with respect to the work performed.[40] Further, the court found that it was irrelevant that MP&L, in its contract, required Deviney Company to secure compensation coverage for its employees, since MP&L would not be liable for coverage to employees of Deviney Company regardless of whether Deviney Company secured coverage.[41] Subse-

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[32] MISS. CODE ANN. § 71-3-7 (1972). Section 71-3-7 provides: "In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment." *Id.*; *see also* V. DUNN, *supra* note 9, § 17.

[33] 418 So. 2d 823 (Miss. 1982).

[34] *Id.*; *see* V. DUNN, *supra* note 9, at § 23 (1984 Supp.). *See generally* A. LARSON, *supra* note 31, at § 72.31.

[35] 477 So. 2d 254 (Miss. 1985).

[36] *Id.* at 257-58.

[37] *Id.* at 255. The power lines were located on the Natchez Trace Parkway, which was operated by the National Park Service. *Id.*

[38] *Id.* at 255-56. The special use permit allowed Mississippi Power & Light to keep the power lines clear of foliage. *Id.*

[39] *Id.* at 256.

[40] *Id.* at 258. In addition to Doubleday v. Boyd Constr. Co., 418 So. 2d 823 (Miss. 1982), the court discussed Nations v. Sun Oil Co., 695 F.2d 933 (5th Cir. 1983), in which the Fifth Circuit left open the question of whether a mineral oil lessee could obtain immunity as a prime contractor. *Id.* at 937-38. The court's rather cursory disposition of that case culminated with this statement: "[W]e think the difference in those cases [*Doubleday* and *Nations*] and the case here is that, on the facts of the present case, appellee was not a prime or general contractor within the meaning of those decisions and the statute." *Falls*, 477 So. 2d at 258.

[41] *Falls*, 477 So. 2d at 258, 258 n.3.

quently, in *Nash v. Damson Oil Corp.*,[42] the court further limited the circle of immunity by denying immunity to a mineral oil lessee.[43] Nash, an employee of Trigger Contractors, Inc., sustained injury performing work in the furtherance of a "master service contract" entered into between Trigger Contractors and Damson Oil Corporation.[44] The contract entitled Trigger Contractors to perform work on a well drilled pursuant to a lease secured between Damson Oil and the unnamed owner of the land.[45] The "master service contract" identified Trigger Contractors as an independent contractor and required Trigger to provide workers' compensation coverage for its workers.[46] After receiving compensation benefits from Trigger Contractors,[47] Nash filed a common-law action against Damson Oil.[48] Damson Oil sought dismissal of the action, contending that Nash was its statutory employee and was prohibited from suing Damson Oil at law.[49] The court recognized that "where the contractor invoking the protections of the exclusiveness of liability statute is not itself liable for compensation to the injured worker, illogic, if not absurdity, would attend sustaining the contractor's exclusivity defense."[50] In denying immunity to Damson Oil, the court held "that Damson's interest, use and activities with respect to the premises are wholly different in nature from those of one ordinarily

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[42] 480 So.2d 1095 (Miss. 1985).

[43] *Id.* at 1096. The court's response would seem to answer the question left unanswered by the Fifth Circuit in Nations v. Sun Oil Co., 695 F.2d 933 (5th Cir. 1983). *See supra* note 40 and accompanying text. The court stated: "We trust it will be apparent that anything in *Nations* contrary to our decision today should be considered with care." *Nash*, 480 So. 2d at 1100 n.1.

[44] *Nash*, 480 So. 2d at 1097-98.

[45] *Id.* at 1096-97.

[46] *Id.*

[47] *Id.* at 1097-98. Trigger Contractors had in fact secured coverage for Nash. *Id.*

[48] *Id.* Nash charged Damson Oil with negligence, claiming Damson Oil was "any other party" within the meaning of MISS. CODE ANN. § 71-3-71 (1972). Section 71-3-71 provides: "The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee shall not affect the right of the employee or his dependents to sue *any other party* at law for such injury or death . . . ." *Id.* (emphasis added).

[49] *Nash*, 480 So. 2d at 1097-98. As authority for its contention, Damson Oil cited *Doubleday*. *Id.* The court succinctly described the issue as follows: "If Damson Oil Corporation is a 'contractor' who is an 'employer' within the Mississippi Workers' Compensation Act, MISS CODE ANN. §§71-3-7 and -9 (1972), Damson wins." *Id.*

[50] *Id.* at 1098-99. The court seemed unimpressed that in its contract Damson Oil "required" Trigger Contractors to provide workers' compensation coverage for Nash. The court stated: "The fact that such a contractor may require one with whom he contracts to carry compensation insurance for the benefit of the worker in question is of little consequence where the subcontractor in fact secures such coverage." *Id.*

considered a general or prime contractor . . . ."[51] Accordingly, Nash was permitted to pursue his common-law action against Damson Oil.[52]

Justice Sullivan, specially concurring, argued *Doubleday* should be overruled.[53] The logic of Justice Sullivan's conclusion seems inescapable. He argued that no declaration of legislative intent guided the court to conclude that the statutes should afford tort immunity to a general contractor whose subcontractor in fact provides coverage for its employees.[54] Since no such intent existed, Justice Sullivan argued, a strict construction of the statutes should have been employed.[55] Justice Sullivan noted a "contractor" should only enjoy exclusiveness of liability when the subcontractor defaults on its statutory obligation, and the "contractor" thereby becomes liable and must secure the payment of compensation to the subcontractor's injured employee.[56]

The application of the rule proposed by Justice Sullivan would be simple. Statutorily imposed upon a worker's immediate employer is the obligation to secure workers' compensation coverage.[57] In exchange for providing this coverage, the immediate employer is afforded tort immunity.[58] If, however, the employer fails to provide such coverage, the worker is given a choice to either sue his immediate employer in tort, or to file a claim for workers' compensation.[59] In the event the worker's

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[51] *Id.* at 1100. Noting that a "linguistic bog" arose upon an attempt to define precisely the terms "contractor," "subcontractor," and "independent contractor," the court rather casually dismissed Damson Oil's immunity claim. The court noted that "Damson's position with respect to the premises is similar to that of Mississippi Power & Light Company in *Falls*, and unlike that of Boyd Construction Co. in *Doubleday*. Damson is an operator or even, in a sense, an owner *pro hac vice*, a lessee. On the other hand, Damson lies outside the common understanding of such terms as 'prime contractor' or 'general contractor.' Therefore, Damson is not the sort of 'contractor' within the meaning and contemplation of Section 71-3-7." *Id.*

[52] *Id.* at 1100-01.

[53] *Id.* at 1103 (Sullivan, J., specially concurring).

[54] *Id.* at 1102. Noting that no legislative declaration of purpose existed in regard to an interpretation of the statutes, Justice Sullivan stated: "What the Court in *Doubleday* says about legislative intent can only be our best guess as to what the legislative intent should have been. In such circumstances, we are better advised to concentrate on what the legislature said and not our speculations as to what it intended." *Id.*

[55] *See supra* note 54 and accompanying text.

[56] *Id.* at 1103 (Sullivan, J., specially concurring).

[57] *See* MISS. CODE ANN. § 71-3-7 (1972). Section 71-3-7 provides: "Every employer to whom this chapter applies shall be liable for and shall secure the payment to his employees of the compensation payable under its provisions." *Id.*

[58] *See* MISS. CODE ANN. § 71-3-9 (1972).

[59] *Id.* Section 71-3-9 provides that "if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter,

immediate employer is also a subcontractor, the worker is given the additional remedy of obtaining workers' compensation benefits from his immediate employer's contractor.[60] In the unlikely event the worker's immediate employer does not secure coverage for the worker, the contractor would be immune from a tort suit upon providing compensation to the worker.[61] Additionally, the contractor, becoming the worker's "employer," would be subrogated to the worker's rights against the immediate employer.[62] If, however, the worker's immediate employer provides coverage for the worker, the contractor is in no way liable for compensation payments and should not be afforded tort immunity.[63] Accordingly, in such a case, the worker should be permitted

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or to maintain an action at law for damages on account of such injury or death." *Id.*

[60] *See* MISS. CODE ANN. § 71-3-7 (1972). The obligation by the contractor to pay workers' compensation benefits appears to be mandatory. Section 71-3-7 provides: "In the case of an employer who is a subcontractor, the contractor *shall* be liable for and *shall* secure the payment of such compensation to employees of the subcontractor . . . ." *Id.* (emphasis added). Accordingly, the worker in such an instance would seem to be afforded only this remedy against the contractor and would not be permitted to sue the contractor at law.

[61] *Nash*, 480 So. 2d at 1103 (Sullivan, J., specially concurring). Justice Sullivan noted: "The most that may be said is that a contractor becomes an 'employer' within the meaning of Section 71-3-7 when and only when the subcontractor has defaulted on its statutory obligations." *Id.; see also* MISS. CODE ANN. § 71-3-7 (1972).

[62] *See* MISS. CODE ANN. § 71-3-71 (1972). Section 71-3-71 provides: "The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee shall not affect the right of the employee or his dependents to sue any other party at law for such injury or death, but the employer or his insurer shall be entitled to reasonable notice and opportunity to join in any such action or may intervene therein. If such employer or insurer join in such action, they shall be entitled to repayment of the amount paid by them as compensation and medical expenses from the net proceeds of such action . . . . An employer or compensation insurer who shall have paid compensation benefits under this chapter for the injury or death of the employee shall have the right to maintain an action at law against any other party responsible for such injury or death, in the name of such injured employee or his beneficiaries, or in the name of such employer or insurer or any or all of them." *Id.*

[63] *Nash*, 480 So. 2d at 1103 (Sullivan, J., specially concurring). Justice Sullivan argued: "A contractor is certainly not an 'employer' of the subcontractor's employees for all purposes and at all times under our Workers' Compensation Act. Otherwise, . . . [b]oth the contractor and the subcontractor would be directed to make compensation payments required under the Act and both would be simultaneously entitled to the assignment of the injured worker's right to recover damages from third parties. Everything directed by the Act would be done in duplicate . . . . It follows that a contractor is an 'employer' entitled to the immunity of Section 71-3-9 only when the subcontractor has defaulted on its statutory obligation and the contractor has stepped in and in fact secured the payment of compensation to the subcontractor's injured employee." *Id.; see also supra* note 50 and accompanying text. *See generally* MISS. CODE ANN. § 71-3-7

to pursue his common-law action against the contractor. The simple approach that would result from following Justice Sullivan's recommendation to abandon the poorly reasoned rule of *Doubleday* would assist in avoiding the "linguistic bog" the court has entered in attempting to draw subtle distinctions between one who is a "prime contractor" and one who is not.[64]

C. *The Right to Reopen*

Final orders issued by the Workers' Compensation Commission are conclusive and binding unless one of the parties perfects an appeal.[65] However, the case may be reopened by the commission if one of the parties establishes a change in conditions or a mistake in the determination of facts.[66] Such a petition to reopen cannot be used as a substitute for the right of appeal.[67]

In *Aetna Casualty & Surety Co. v. Espinosa*,[68] the court more clearly defined the instances in which a case may be reopened.[69] The claimant suffered a mental disability which she claimed was the result of a work related injury.[70] The claimant was awarded compensation benefits up to the date of maximum medical recovery from her physical injuries, but was denied benefits thereafter on the ground that she failed to meet the burden of proof required for claims of mental disa-

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(1972)(contractor is liable for compensation benefits to employee *unless* subcontractor has secured such payment)(emphasis added).

[64] *Nash*, 480 So. 2d at 1101-02 (Sullivan, J., specially concurring). Justice Sullivan noted: "*Doubleday* concluded that the contractor—there Boyd Construction—was entitled to tort immunity under Section 71-3-9. *Falls* and today's case give lip service to this idea, only each goes on to say that the contractors there—Mississippi Power & Light and Damson—are not the kind of contractors contemplated by *Doubleday*, whatever all of that means." *Id.* at 1103.

[65] V. DUNN, *supra* note 9, § 336.

[66] MISS. CODE ANN. § 71-3-53 (1972). Section 71-3-53 provides: "Upon its own initiative or upon the application of any party in interest *on the ground of a change in conditions or a mistake in a determination of fact*, the commission may, at any time prior to one (1) year after date of last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." *Id.* (emphasis added); *see also* V. DUNN, *supra* note 9, § 336.

[67] North Miss. Medical Center v. Henton, 317 So. 2d 373, 376 (Miss. 1975).

[68] 469 So. 2d 64 (Miss. 1985).

[69] *Id.* at 66-67.

[70] *Id.* at 65. Claimant suffered a lower back injury at work and thereafter experienced a "mental pain syndrome" which rendered her totally functionally disabled. *Id.*

bility resulting from physical injury.[71] Instead of appealing the decision,[72] the claimant sought to reopen the case alleging a change in conditions or a mistake in the determination of facts.[73] The claimant argued that her disability worsened from a temporary to a permanent condition, and accordingly, that her case should be reopened.[74]

Noting that compensation was denied on the first hearing but was granted on reopening, the court recognized the legislature's wording of "change in conditions" and "mistake in the determination of facts" indicated an intent to differentiate between the two grounds for reopening a case.[75] Regarding the reopening of a case for change in conditions, the court held that "a change of condition indicating the need for a change in compensation payments necessarily presupposes a prior adjudication of compensability including a causal connection between the initial injury and the present physical or mental condition."[76] Although a change in the conditions of the claimant did occur in that her temporary disability had become permanent, the court held that since the earlier finding of a lack of a causal connection between the physical injury and the mental disability had become final, due to the failure of the claimant to appeal that decision, res judicata barred the reopening of the case on the ground of a change in conditions.[77] Referring to the reopening of a case because of a mistake in the determination of facts as "the other side of the coin,"[78] the court noted that "the legislature intended, by permitting reopening because of a mistake in the determination of fact, to permit an award of compensation because of newly discovered evidence or that which for whatever good reason was not previously reflected in the record."[79] The court held such newly discovered or omitted evidence could be introduced to establish the requisite causal connection between the physical injury and the resulting mental disability.[80] However, since no such testimony was presented to estab-

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[71] *Id.*

[72] *Id.* at 66. The claimant did perfect an appeal to the supreme court from the order of the circuit court which denied benefits. However, the claimant subsequently joined the carrier in the dismissal of the appeal. *Id.*

[73] *Id.; see supra* text accompanying note 65.

[74] *Espinsosa*, 469 So. 2d at 66.

[75] *Id.; see supra* text accompanying note 65.

[76] *Espinosa*, 469 So. 2d at 66.

[77] *Id.* at 67.

[78] *Id.* at 66.

[79] *Id.*

[80] *Id.* at 66-67; *see also* V. DUNN, *supra* note 9, § 336.1 (failure of commission to consider relevant facts must not be due to failure of party to produce available evidence).

lish that a mistake in the determination of facts had indeed occurred, the court held the case could not be reopened on that basis.[81] Noting that the continuing jurisdiction statute was not intended to be a substitute for an appeal,[82] the *Espinosa* court held the claimant's petition to reopen was barred by res judicata.[83]

Inasmuch as res judicata acts as an absolute bar to future proceedings,[84] subject to very few exceptions,[85] the court's application of the doctrine seems questionable in light of the existence of an express continuing jurisdiction statute.[86] It is important to note that the court held that the presentation of newly discovered or omitted evidence would have given the commission leave to reopen the case.[87] It is unclear how this could be accomplished since future proceedings would be barred by res judicata, unless of course the court accepts as an exception to res judicata in workers' compensation cases, the presentation of newly discovered or omitted evidence. However, the establishment of such an exception was certainly not made clear by the *Espinosa* court. It seems that the court could just as easily have disposed of the case by applying its well-established "law of the case" doctrine,[88] and could have avoided entirely the confusion created by its reference to the doctrine of res judicata. In so doing, the court not only could have resolved the case at hand, but also could have employed its logical analysis to provide a helpful and simple step-by-step procedure for future determinations of when and whether cases should be reopened. As the case stands, however, with its reference to res judicata intact, only future cases can provide clear interpretations of the impact

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[81] *Espinosa*, 469 So. 2d at 67.

[82] *Id.; see* North Miss. Medical Center v. Henton, 317 So. 2d 373, 376 (Miss. 1975).

[83] *Espinosa*, 469 So. 2d at 67.

[84] Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). The Court stated:

> The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Id. (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)).

[85] *See* See-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 579 (1974)("The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, *absent fraud* or some other factor *invalidating the judgment*")(emphasis added); *see also* J. LANDERS & J. MARTIN, CIVIL PROCEDURE 953-54 (1981)(because of stringent requirements of res judicata, exceptions are rare).

[86] *See supra* note 66 and accompanying text.

[87] *See supra* note 80 and accompanying text.

[88] *See* Consumer Discount Store v. Warren, 221 So. 2d 112, 112-13 (Miss. 1969)(prior disposition of case barred relitigation of same facts already adjudicated).

of res judicata in workers' compensation cases.

II. EDUCATION

A. *Disciplinary Power of Local School Governing Bodies*

In *Clinton Municipal Separate School District v. Byrd*,[89] the court affirmed the authority of governing bodies of local schools to punish students for violating school policies.[90] Pursuant to published school policy,[91] the school board enforced a mandatory suspension of two eleventh graders caught vandalizing school property.[92] The students sought and obtained a permanent injunction allowing them to continue attending school.[93]

On appeal, the court noted that the governing bodies of local schools have substantial authority to regulate the activities of students,[94] and to punish students for violating school policies[95] and dam-

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[89] 477 So. 2d 237 (Miss. 1985).

[90] *Id.* at 240-41.

[91] *Id.* at 240. The published school policy provides: "Any student in grade seven (7) or above who vandalizes, destroys, or defaces school property with paint or otherwise, or who floods a school building shall be suspended for the remainder of the then current semester and shall be readmitted at the beginning of the next semester only after the student and/or his/her parent/guardian provides an assurance in writing that such behavior will not be repeated." *Id.*

[92] *Id.* at 238. In the early morning, the two high school girls were caught by police painting the numeral "1" three feet in height on a brick wall of the school building. *Id.*

[93] *Id.* at 239.

[94] *Id.*; *see* MISS. CODE ANN. § 37-7-301(c),(e),(1)(Supp. 1984). Section 37-7-301 provides:

> The board of trustees of school districts shall have the following powers, authority and duties in addition to all others imposed or granted by law, to-wit:
> (c) To be the custodians of the school property and to manage, control, and care for same, both during the school term and during vacation; . . .
> (e) To suspend or expel a pupil for misconduct in the school, upon school buses, on the road to and from school, during recess or upon the school playgrounds; . . .
> (l) To prescribe and enforce rules and regulations not inconsistent with law or with the regulations of the state board of education for their own government and for a government of the schools . . . .

Id.

[95] MISS. CODE ANN. § 37-9-71 (1972). Section 37-9-71 provides:

> The superintendent of a school district and the principal of a school shall have the power to suspend a pupil for good cause or for any reason for which such pupil might be suspended, dismissed or expelled by the board of trustees. However, such action of the superintendent or principal shall be subject to review by and the approval or disapproval of the board of trustees.

Id.

aging school property.[96] Further, the court noted that the punishment contemplated by the board was within the limits of its authority.[97] However, the court held that the right to a minimally adequate public education created by the laws of the state is a fundamental right,[98] and that this right entitles the student to the full substantive and procedural protections of the due process clause of the Mississippi Constitution.[99] Balancing these considerations, the court held that a school board's disciplinary scheme is constitutionally enforceable when, fairly viewed, it furthers a substantial legitimate interest of the school district.[100] This authority gives the school board substantial discretion in administering punishments to students who violate school rules,[101] and such discretion is not to be interfered with so long as constitutional parameters are not transgressed.[102] Accordingly, the court held that the punishment, fairly viewed, did in fact further substantial legitimate interests of the school district.[103]

Although the court did not entirely agree with the school board's disciplinary action,[104] it chose to exercise judicial deference in such cases to prevent the state's courtrooms from becoming a battleground to resolve disputes which are better handled by local school boards.

B. Application of Municipal Zoning Ordinances to Public School

In *Robinson v. Indianola Municipal Separate School District*,[105] the court held that municipal zoning requirements for off-street parking are applicable to school districts.[106] Residents of the neighborhood

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[96] MISS. CODE ANN. § 37-11-19 (1972). Section 37-11-19 provides: "If any pupil shall wilfully destroy, cut, deface, damage, or injure any school building, equipment or other school property he shall be liable to suspension or expulsion and his parents or person or persons in loco parentis shall be liable for all damages." *Id.*

[97] *Byrd*, 477 So. 2d at 240.

[98] *Id.; see* MISS. CODE ANN. § 37-1-2 (Supp. 1984).

[99] *Byrd*, 477 So. 2d at 240. The court noted that this was true regardless of any less stringent construction given to the United States Constitution. *Id.*

[100] *Id.* at 240.

[101] *Id.* at 241.

[102] *Id.; see also* Shows v. Freeman, 230 So. 2d 63, 64 (Miss. 1969)(courts will not interfere with school authorities provided there is some rational basis for the rule).

[103] *Byrd*, 477 So. 2d at 241. The court pointed out that its decision should not be interpreted as supportive of such harsh punishment. On the contrary, the court chastised the school board and strongly intimated that a more merciful penalty would have, in its opinion, been appropriate. *Id.* at 242.

[104] *See supra* note 103.

[105] 467 So. 2d 911 (Miss. 1985).

[106] *Id.* at 917.

in which the school district proposed to build a new school gymnasium sought to enjoin construction of the building.[107] The court noted the long-standing grant of immunity given to subdivisions of the state from suits based on the exercise of discretionary governmental authority[108] and held that the residents were not entitled to enjoin the school's action as to the location and construction of the gymnasium.[109] Aside from the school's decision regarding the location and construction of the building, however, the school's failure to comply with a municipal zoning ordinance[110] presented the question of whether a public school is bound by such an ordinance.[111] Recognizing that the State Building Commission is not subject to municipal building codes because of its plenary sovereign power to construct buildings for state use free of municipal regulation,[112] the court noted that the school district does not enjoy the same plenary power in the construction of buildings.[113] While the school district is an arm of the sovereign regarding the school's decision as to location and construction, the court held that the municipality is likewise an arm of the sovereign with the right

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[107] *Id.* at 913.

[108] *Id.* at 915-16; *see* MISS. CODE ANN. § 11-46-9 (c),(m) (Supp. 1984). Section 11-46-9 provides:

> A governmental entity shall not be liable for any claim:
> (c) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused; . . .
> (m) Arising out of a plan or design for construction or improvements to public property, including but not limited to public buildings, . . . where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design . . . .

Id.

[109] *Robinson*, 467 So. 2d at 916.

[110] *Id.* Indianola Zoning Ordinance § 559.7(j) requires either one parking space for every four seats in a school's main auditorium or one parking space for every seventeen classroom seats, whichever is greater. Concededly, the proposed gymnasium would then require between 375 and 500 parking spaces to comply with the ordinance. *Robinson*, 467 So. 2d at 914. The school's plans provided only for a total of 93 parking spaces. *Id.* at 916.

[111] *Robinson*, 467 So. 2d at 916.

[112] *Id.; see* City of Jackson v. Mississippi State Bldg. Comm'n, 350 So. 2d 63, 65-66 (Miss. 1977)(State Building Commission has plenary power under §§ 21-19-25 and 31-11-3 to construct state buildings).

[113] *Robinson*, 467 So. 2d at 917.

to govern non-educational matters such as public safety.[114] Noting that the safety of a municipal public street is within the sovereign domain of the municipality and not the school, the court held that the municipal zoning requirement for off-street parking was applicable to the school district.[115] Since the school district had not complied with the municipal zoning ordinance, and since a private citizen may enjoin a condition which obstructs his right of ingress and egress to his property,[116] the court enjoined the construction of the gymnasium unless and until the school board complied with the off-street parking ordinance.[117]

The case is indicative of the often encountered power struggle between a municipality and a municipal separate school district. The court recognized that a school district, just as an individual citizen, is not entitled to ignore city ordinances, but must cooperate with the city when necessary to accomplish mutual goals.[118]

III. Open Meetings Law

In *Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corp.*,[119] the court held that the open meetings law[120] applies to the Board of Trustees of State Institutions of Higher

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[114] *Id.*

[115] *Id.*; *cf.* City of Ellisville v. State Highway Comm'n, 186 Miss. 473, 475, 191 So. 274, 276 (1939)(legislative intent to confer right to control traffic on another authority must be clearly expressed). The *Robinson* court noted, in response to the school board's argument, that since the city had impliedly granted a variance to the school, then the city was bound by its own rules in granting variances. Thus, since the city had not complied with its own ordinance which requires public notice and hearing, no variance could have been granted. *Robinson*, 467 So. 2d at 917; *see* Kynerd v. City of Meridian, 366 So. 2d 1088, 1088 (Miss. 1979)(city must abide by its own ordinance in granting exception to zoning requirement).

[116] *Robinson*, 467 So. 2d at 918; *e.g.*, Shoemaker v. Coleman, 94 Miss. 619, 620, 47 So. 649, 650 (1909)(citizen can maintain an action where injury interferes with his right of ingress to and egress from property); *cf.* Coleman v. Holden, 88 Miss. 798, 798, 41 So. 374, 374 (1906)(lessee may bring an action for damages in respect to obstructing rights to ingress and egress to property).

[117] *Robinson*, 467 So. 2d at 918.

[118] *See supra* notes 102-10 and accompanying text.

[119] 478 So. 2d 269 (Miss. 1985).

[120] Miss. Code Ann. §§ 25-41-1 to -17 (Supp. 1984). The Act guarantees the public the right, among other things, to attend meetings of governmental entities. *Id.* § 25-41-5; *see 1984 Supreme Court Review: Administrative Law*, 54 Miss. L.J. 45, 64-71 (1984)(analysis of court's first construction of open meetings law); *see also* Comment, *Open Meetings Laws: An Analysis and a Proposal*, 45 Miss. L.J. 1151, 1151-77 (1974) (background, development and rationale of open meetings laws). *See generally* Parks,

Learning.[121] The Mississippi Legislature proscribed certain exceptions to the open meetings law whereby political subdivisions may enter into "executive session" beyond the view of the public.[122] The Board of Trustees thereafter promulgated its own set of additional exceptions, thereby expanding its power to meet in executive session in instances not contemplated by the statute.[123] The press challenged this action by the Board, and, noting that openness in government is the public policy of Mississippi,[124] the court held that the Board was without power to create additional exemptions to the Act.[125] The court held that a meeting within the context of the open meetings law includes all deliberative states of the decision-making process that lead to the formation and determination of public policy and that these meetings cannot take place out of the view of the public.[126] Specifically, the court held that two types of meetings must be open to the public: (1) meetings which involve the academic program review, which is an evaluation of the curriculum offerings in approximately eight-hundred Mississippi university programs, and (2) telephone polls among board members used to conduct official acts.[127] Noting the difficulty which may arise in determining which activities fall within the personnel exception to the open meetings law,[128] the court held that such determinations must be

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The Open Government Principle: Applying the Right to Know Under the Constitution, 26 GEO. WASH. L. REV. 1, 6-13 (1958)(freedom of press implies right to gather information from governmental entities).

[121] *Mississippi Publishers*, 478 So. 2d at 276. The court dismissed the Board's initial argument that since the Board was a constitutionally created entity, it was beyond the reach of the legislation. The court held that since the Board was a trustee of the public, it had a duty to disclose to its beneficiary, the public. *Id.* at 275-76.

[122] MISS. CODE ANN. § 25-41-7(4)(Supp. 1984). The statute enumerates eleven situations in which a governmental entity may meet "behind closed doors." *Id.*

[123] *Mississippi Publishers*, 478 So. 2d at 274 n.1. The Board created six additional exemptions under which it was entitled to enter into "executive sessions." *Id.*

[124] *See* Mayor & Aldermen v. Vicksburg Printing & Publishing Co., 434 So. 2d 1333, 1336 (Miss. 1983)(legislature declared governmental meetings open as a matter of public policy).

[125] *Mississippi Publishers*, 478 So. 2d at 277.

[126] *Id.* at 278.

[127] *Id.* at 278-79. The chancellor had noted that a telephone poll was a device used to circumvent the Open Meetings Act because functions that are purely social are not covered. *Id.* at 278; *see* MISS. CODE ANN. § 25-41-17 (Supp. 1984).

[128] *Mississippi Publishers*, 478 So. 2d at 280; *see* MISS. CODE ANN. § 25-41-7(4)(a)(Supp. 1984). Subsection (4)(a) permits a public body to enter into executive session when a meeting involves the "transaction of business and discussion of personnel matters or the character, professional competence, or physical or mental health of a person." *Id.*

made on a case-by-case basis.[129]

Holding true to its initial interpretation of the Open Meetings Law, in which the court declared openness to be the public policy of the state,[130] the court has now further expanded the Open Meetings Law to include the Board of Trustees. Such openness concerning the Board's activities can only serve to benefit the state in helping to achieve and maintain quality education in Mississippi.

Mark Mallery

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[129] *Mississippi Publishers*, 478 So. 2d at 280.

[130] *Id.* at 279; *see supra* note 120 and accompanying text.

CIVIL PROCEDURE

The Mississippi Supreme Court rendered twenty-eight decisions in the area of civil procedure in 1985. The design of this review is to present those cases which have been interpreted as having changed the state of the law, created new law, or further explained and clarified existing law. The cases developed herein represent the following areas: venue, appeals, amicus curiae briefs, and ancillary jurisdiction. The remaining cases are omitted not because they are unimportant, but rather because they are beyond the scope of this review. These cases may be characterized as falling within the following categories: appeals,[1] attorney's fees,[2] publication prerequisites in public contract procedure,[3] judgments,[4] jurisdiction,[5] Mississippi Rules of Civil Procedure,[6] and miscellaneous.[7]

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[1] Gray v. Alexander Extrusions, Inc., 477 So. 2d 1355, 1356-57 (Miss. 1985)(standard of review of chancellor's findings); Southern Farm Bureau Casualty Ins. Co. v. Holland, 469 So. 2d 55, 59 (Miss. 1985)(proposal for interlocutory appeals to Mississippi Supreme Court involved controlling question of law); Stanley v. Allstate Ins. Co., 465 So. 2d 1023, 1025 (Miss. 1985)(dismissal of action as to served parties was final order; appeal therefore did not require compliance with Miss. R. Civ. P. 54(b) certification rules).

[2] Contractors' Lumber & Supply Co. v. Champion Int'l Corp., 463 So. 2d 1084, 1087 (Miss. 1985)(failure to tender defense of plaintiff's action to indemnitor precluded award of attorney's fees); Staton & Assocs. v. Bryant Constr. Co., 464 So. 2d 499, 504 (Miss. 1985)(attorney's fees and prejudgment interest not recoverable in quantum meruit suit unless contractually provided for); Massey v. Massey, 475 So. 2d 802, 804 (Miss. 1985)(attorney's fees must be made payable to party for use and benefit of attorney).

[3] Aetna Casualty and Sur. Co. v. Doleac Elec. Co., 471 So. 2d 325, 329 (Miss. 1985)(publication prerequisites are jurisdictional in public contracts involving surety's bonds).

[4] Federal Sav. & Loan Ins. Corp. v. S & W Constr. Co., 475 So. 2d 145, 147 (Miss. 1985)(sworn answer filed before execution of default judgment is proper to limit liability; writ of attachment did not support default judgment); Rideout v. Knight, 463 So. 2d 1042, 1043 (Miss. 1985)(court must weigh only evidence favorable to plaintiff when considering defendant's motion for directed verdict); Stubblefield v. Jesco, Inc., 464 So. 2d 47, 62 (Miss. 1985)(legal interest calculated from date of original entry of judgment); Thomas v. Munson Mach., Inc., 463 So. 2d 1044, 1046 (Miss. 1985)(product liability action; summary judgment is proper where product is not defective but improperly installed by plaintiff).

[5] Camp v. Roberts, 462 So. 2d 726, 727 (Miss. 1985)(where nonresident committed tort in whole or in part within state against nonresident, action was maintainable in Mississippi court); Miss Cal 204, Ltd. v. Upchurch, 465 So. 2d 326, 329-30 (Miss. 1985)(foreign limited partnership may utilize Mississippi courts for action accruing before registration).

[6] Johnson v. Franklin, 481 So. 2d 812, 815-16 (Miss. 1985)(cross-claim must be prop-

In addition, three cases of potential significance to Mississippi practitioners that have not been selected for development herein are nonetheless worthy of note. In *Boardman v. United Services Automobile Association*,[8] the court addressed issues involved in Rule 46 certification[9] and Mississippi's choice of law rules.[10] The holding of *First National Bank of Vicksburg v. Middleton*[11] was that Rule 22 replaces and eliminates traditional interpleader requirements.[12] In *Hollingsworth v.*

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erly filed and served upon party against whom relief is to be granted); Leader Nat'l Ins. Co. v. Lindsey, 477 So. 2d 1323, 1327 (Miss. 1985)(MISS. R. CIV. P. 8(a)(1) pleadings are consistent with the garnishment statutes); Universal Computer Servs., Inc. v. Lyall, 464 So. 2d 69, 73 (Miss. 1985)(MISS. R. CIV. P. 64 supplements Mississippi's attachment statute).

[7] American Fidelity Fire Ins. v. Athens Stove Works, Inc., 481 So. 2d 292, 295 (Miss. 1985)(constitutionally adequate notice required for private bond intervention suits); Flowers v. Stone County Bd. of Educ., 469 So. 2d 1261, 1261 (Miss. 1985)(upheld decision not to renew teacher's contract); Luckett v. Mississippi Wood, Inc., 481 So. 2d 288, 290 (Miss. 1985)(intentional bad-faith refusal to provide workers' compensation benefits falls within jurisdiction of circuit court); Peeples v. Yarbrough, 475 So. 2d 1154, 1159 (Miss. 1985)(court's circumvention of right to use garnishment proceedings was manifest error).

[8] 470 So. 2d 1024 (Miss. 1985).

[9] *Id.* at 1027-31. MISS. SUP. CT. R. 24 allows federal courts to "certify" questions of law to the Mississippi Supreme Court when the case calls for application of Mississippi law where such state law is unclear. *Id.*

In the *Boardman* opinion, the court distinguished questions of law declaration from questions of fact determination and law application. *Boardman*, 470 So. 2d at 1029-30. The court then stated that Rule 24 was adopted for the purpose of allowing the court to answer questions of law declaration, but not of fact determination or law application. *Id.* at 1030. However, the court stated that even though the question certified in *Boardman* required law application, it would answer the certified questions in the interest of expedience. *Id.*

[10] *Boardman*, 470 So. 2d at 1030. The issue in the *Boardman* case concerned choice of law in determining rights related to insurance coverage. The court noted that Mississippi applies the "center of gravity" test in determining choice of law questions. *Id.* at 1030. In an instructive opinion, the court discussed its prior opinions in the area of choice of law determination, citing various decisions of its own as well as sections of the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS (1971), which has been expressly incorporated into Mississippi law. *Boardman*, 470 So. 2d at 1030-39.

[11] 480 So. 2d 1153 (Miss. 1985).

[12] *Id.* at 1155. The court noted the four elements that had historically been required for equitable interpleader, as follows:

> 1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded;
>
> 2. All their adverse titles or claims must be dependent on or be derived from a common source;
>
> 3. The person asking the relief—the plaintiff—must not have or claim any interest in the subject matter;

Bovaird Supply Co.,[13] the court overruled established precedent[14] and held that an "accident reconstructionist" may qualify as an expert witness.[15]

I. VENUE

In *Belk v. State Department of Public Welfare*,[16] the Mississippi Supreme Court applied the Mississippi Rules of Civil Procedure in holding that an individual defendant waived a defense of improper venue by failing to raise a timely objection.

The Department of Public Welfare filed child support[17] and bastardy[18] proceedings in the Chancery Court of Lowndes County against Belk, a resident of Clay County.[19] Under Mississippi law, venue was

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4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them in the position of a stakeholder.

Id. at 1155. Citing the comment to MISS. R. CIV. P. 22 and 48 C.J.S. *Interpleader* § 5 (1981), at 125-26, the Mississippi Supreme Court determined that Rule 22 is a procedural tool meant to "broaden and extend the scope of the remedy in chancery court." *Middleton*, 480 So. 2d at 1155-56.

The court stated that the primary test for determining the propriety of an interpleader action is "whether the stakeholder legitimately fears multiple vexation directed against a single fund." *Id.* at 1157 (quoting comment to MISS. R. CIV. P. 22). Because this test was satisfied in *Middleton*, the supreme court reversed the ruling of the Warren County Chancery Court, which had dismissed the interpleader action for failure to satisfy the historical prerequisites. *Middleton*, 480 So. 2d at 1157.

[13] 465 So. 2d 311 (Miss. 1985)(en banc; 5-4 decision).

[14] *Id.* at 314 (citing cases in which testimony by accident reconstructionists was held inadmissible). In a previous case, the court had held that such testimony was "an invasion of the province of the jury." Hogan Storm Fence Co. v. Edwards, 245 Miss. 487, 492, 148 So. 2d 693, 695 (1963).

[15] *Hollingsworth*, 465 So. 2d at 315-16. The trial court in *Hollingsworth* excluded testimony by an accident reconstructionist relating to an automobile collision. *Id.* at 313-14. On appeal, the Mississippi Supreme Court noted that expert testimony had been allowed in other types of lawsuits, including municipal annexations, agricultural damage, and medical malpractice. *Id.* at 314-15. Therefore, in order to place litigants involved in automobile collision cases in a position similar to that of litigants involved in cases concerning other areas of the law, the court reversed and remanded, holding that the expert's testimony should be admitted. *Id.* at 315.

[16] 473 So. 2d 447 (Miss. 1985).

[17] *Id.* at 448. Child support proceedings were filed under MISS. CODE ANN. § 43-19-31 (Supp. 1984).

[18] *Belk*, 473 So. 2d at 448. Bastardy proceedings were instituted pursuant to MISS. CODE ANN. § 93-9-9 (1972).

[19] *Belk*, 473 So. 2d at 448. The Department wrongly alleged that Belk was a Lowndes County resident. *Id.*

proper only in Clay County.[20] Belk made no response after process was served on him in Clay County, and a default judgment was entered.[21] Belk moved to dismiss a subsequent contempt proceeding,[22] as well as the underlying default judgment, asserting that the Lowndes County judgment was void due to improper venue.[23] Applying Rule 82(d) of the Mississippi Rules of Civil Procedure, the chancellor found that Belk's remedy would have been to file a proper objection to venue.[24] The chancellor treated Belk's motion to dismiss as an objection to venue.[25] Because the motion was not timely filed, the chancellor found that Belk had waived the objection.[26]

The development of Mississippi's law governing the validity *vel non* of judgments rendered by courts lacking proper venue has been inconsistent and confusing.[27] In the 1800's, the state's highest court uniformly held that such judgments were void.[28] In 1930, the court stated that a default judgment rendered by a court without proper venue was "voidable, if not void."[29] In 1957, the court held that an individual defendant "had the right to be sued in the county of his residence,"[30] and that a default judgment rendered against a defendant who made no appearance was void when rendered by a court without

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[20] *See* Metts v. State Dep't of Pub. Welfare, 430 So. 2d 401, 401 (Miss. 1983)(decision involving paternity and child-support proceedings). After construing two inconsistent venue statutes, MISS. CODE ANN. § 43-19-31 (Supp. 1982) and § 93-9-17 (1972), the *Metts* court determined that § 93-9-17 controlled. *Metts*, 430 So. 2d at 405. Therefore, the *Belk* court stated that "[t]he effect of our ruling in *Metts* was that a defendant in a paternity action has the right to be sued in the county in which he resides." *Belk*, 473 So. 2d at 450.

[21] *Belk*, 473 So. 2d at 448.

[22] *Id.* The contempt proceeding was based upon Belk's noncompliance with child support payment requirements included in the Chancellor's previous order. *Id.*

[23] *Id.* The court cited the paternity statue, MISS. CODE ANN., § 93-9-17 (1972), which states in part that "if the father resides or is domiciled in this state, the action must be brought in the county where the father resides."

[24] *Belk*, 473 So. 2d at 448.

[25] *Id.*

[26] *Id.*

[27] *See* Gillard v. Great S. Mortgage & Loan Corp., 354 So. 2d 794, 796-97 (Miss. 1978)(citing "divergent judgments" rendered by the court); *id.* at 798 (Sugg, J., dissenting)(stating that Mississippi Supreme Court's opinions demonstrate lack of consistency in construing statutes).

[28] *See, e.g.*, Wolley v. Bowie, 41 Miss. 553, 554 (1867); Bank of Vicksburg v. Jennings, 6 Miss. (5 Howard) 425, 426 (1841). For a more thorough discussion of the history of Mississippi's venue law, see Note, *A Question of Venue*, 43 MISS. L.J. 130, 131-34 (1972).

[29] Perry v. Nolan & Maris, 159 Miss. 384, 387, 131 So. 252, 253 (1930).

[30] Bryant v. Lovitt, 231 Miss. 736, 737, 97 So. 2d 730, 731-32 (1957).

proper venue.[31]

Leake County Cooperative v. Dependents of Barrett,[32] rendered in 1969, demonstrated that the venue defense could be waived. In this case, the court distinguished venue from jurisdiction,[33] and stated that while a defendant had a right to have a case tried in a court of proper venue, that right could be waived if it were not timely asserted.[34] In *Barrett*, a judgment was rendered by a trial court that had jurisdiction but lacked venue.[35] After the Mississippi Supreme Court affirmed the judgment, the defendant raised his venue objection for the first time by way of a petition for rehearing.[36] The court held that the venue defense had been waived.[37]

In *Wofford v. Cities Service Oil Co.*,[38] the court held that the general venue statute[39] required a defendant to raise a timely objection to improper venue[40] or forfeit the objection.[41] Since the defendants in *Wofford* did not file their motion to vacate judgment for lack of jurisdiction until over one and one-half years after default judgment was

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[31] *Id.* at 736, 97 So. 2d at 731.

[32] 226 So. 2d 608 (Miss. 1969).

[33] *Id.* at 615. The court stated:

> Jurisdiction connotes the power to decide a case on the merits, while venue connotes locality, the place where the suit should be heard. The word "venue," unless it is given jurisdictional effects by localizing the action, relates only to the place where, or the territory within which, either party may require the case to be tried, and unless it is a local action, the question of jurisdiction of subject matter is not involved. The mere existence of general rules of venue, whether at common law or statutory form, does not of itself affect the right of the court to hear and determine foreign causes.

Id.

[34] *Id.* at 616. The court stated that "[t]he right to have a case heard in the court of the proper *jurisdiction* may be lost unless seasonably asserted." *Id.* (emphasis added). Since the issue in the case was venue rather than jurisdiction, it is presumed that the term "jurisdiction" was used inadvertently.

[35] *Id.* at 615.

[36] *Id.* at 614.

[37] *Id.* at 616. The court did not specify the point at which the defense was waived; therefore, it was unclear whether the appellants could have asserted the objection at the initial appeal.

[38] 236 So. 2d 743 (Miss. 1970); *see* Note, *supra* note 28 (casenote examining *Wofford*).

[39] MISS. CODE ANN. § 1433 (1942)(current version at MISS. CODE ANN. § 11-11-3 (1972)).

[40] *Wofford*, 236 So. 2d at 745-46 (citing King v. Ainsworth, 225 Miss. 248, 83 So. 2d 97 (1955)).

[41] *Wofford*, 236 So. 2d at 745-46.

entered,[42] the court held that venue had been waived.[43]

In *Gillard v. Great Southern Mortgage & Loan Corp.*,[44] the court added further confusion to the law of venue by reversing a default judgment[45] because it was entered by a court without proper venue.[46] Citing subtle—if not dubious[47]—distinctions from *Wofford* and other cases,[48] the court held that, unless a plaintiff made a "bona fide and reasonable effort . . . to file his suit in the county"[49] in which venue was proper, a defendant did not waive venue by failing to appear and raise a timely objection.[50] Two dissenting justices suggested that the court promulgate a rule governing cases filed in courts of improper venue.[51]

Subsequent to the *Gillard* decision, the court adopted MISS. R. CIV. P. 82(d), entitled "Improper Venue."[52] This rule is patterned after section 11-11-17 of the Mississippi Code.[53] The court noted in *Belk* that it was "of great importance"[54] that the suit was brought after the effective date of the Mississippi Rules of Civil Procedure.[55] According to the Belk opinion, "the thrust of [Rule 82(d)] is that when an action is filed laying venue in the wrong county, the action shall not be dismissed,"[56] but instead must be transferred to a proper court if a timely

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[42] *Id.* at 744.

[43] *Id.* at 746.

[44] 354 So. 2d 794 (Miss. 1978).

[45] *Id.* at 795, 798.

[46] *Id.* at 795-96. The suit was filed in Pike County by a resident of Louisiana. The defendants, residents of Calhoun and Marshall counties, were served in the counties in which they resided. *Id.*

[47] *See id.* at 800 (Broom, J., dissenting)(finding no logical factual distinction between facts of *Gilliard* and facts of *Wofford*).

[48] *Id.* at 795-98. The court found factual distinctions between *Gillard* and Bryant v. Lovitt, 231 Miss. 736, 97 So. 2d 730 (1957), as well as *Barrett*, 226 So. 2d 608 (Miss. 1969).

[49] *Gillard*, 354 So. 2d at 798.

[50] *Id.* at 797-98.

[51] *Id.* at 798 (Sugg, J., dissenting), 800 (Broom, J., dissenting).

[52] MISS. R. CIV. P. 82(d) reads as follows:

> (d) Improper Venue. When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein . . . .

Id.

[53] MISS. R. CIV. P. 82(d) comment.

[54] *Belk*, 473 So. 2d at 450.

[55] The rules became effective January 1, 1982.

[56] *Belk*, 473 So. 2d at 450.

motion is made.[57]

The court stated that Rule 12(b) of the Mississippi Rules of Civil Procedure provides the proper method for raising venue objections.[58] The court further noted that Rule 12(h) provides for waiver of the venue defense if an objection is not included in a responsive pleading or made by a proper motion.[59]

Noting that the Lowndes County Chancery Court obtained personal jurisdiction over Belk,[60] the court addressed the issue of "whether Belk must apply for a change of venue or whether the Welfare Department is required to bring the paternity action in the county of Belk's residence."[61] The court determined that the proper mechanism for raising an objection to venue would be a Rule 12 motion.[62] Citing Rules 12(b)(3) and 12(h)(1) of the Mississippi Rules of Civil Procedure, the court held that Belk had failed to properly object to venue, and had therefore waived the right.[63] The chancellor's decision overruling Belk's motion to dismiss was affirmed.[64]

The court's decision in *Belk* demonstrates that any defendant wishing to challenge venue would be well advised to do so by utilizing the mechanisms provided in the Mississippi Rules of Civil Procedure. Citing the *Wofford* decision,[65] the *Belk* court stated that "venue is waived where a defendant does not timely apply for a transfer."[66]

Unfortunately, the court did not choose to expressly overrule *Gillard*,[67] and as a result, that case must continue to concern any plaintiff who takes a default judgment in a court where venue is uncertain. Par-

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[57] *Id.*

[58] *Id.*

[59] *Id.* at 450-51; *see infra* note 68.

[60] *Belk*, 473 So. 2d at 451.

[61] *Id.*

[62] *Id.*

[63] *Id.* The court began "with the basic premise that venue may be waived," citing Leake County Coop. v. Dependents of Barrett, 226 So. 2d 608, 616 (Miss. 1969); *see also* King v. Ainsworth, 225 Miss. 248, 250-51, 83 So. 2d 97, 98-99 (1955)(stating court which lacks venue jurisdiction shall not dismiss for lack of such jurisdiction and shall not transfer unless there is objection to venue).

[64] *Belk*, 473 So. 2d at 451.

[65] *See supra* notes 38-43 and accompanying text.

[66] *Belk*, 473 So. 2d at 451.

[67] *Id.* The *Gillard* case required the court to examine the plaintiff's motive in filing suit in the wrong county. *See supra* text accompanying notes 49-51. Some comments by the court at the end of the *Belk* opinion may be construed as an application of the *Gillard* case. *See Belk*, 473 So. 2d at 451 (court found no suggestion that action had been filed in improper county in order to invoke jurisdiction of its court to detriment of defendant).

ties to lawsuits and the attorneys who represent them would be greatly aided by promulgation of a rule expressly stating that failure to properly raise a venue objection constitutes a waiver of that objection, whether or not the defendant enters an appearance in court.[68]

II. APPEALS

In the two cases discussed here, parties attempted to perfect appeals after expiration of the thirty-day deadline created by Rule 48 of the Mississippi Supreme Court Rules. The court allowed the out-of-time appeal in *Clark v. City of Pascagoula*.[69] However, in *Landrum v. Bailey*,[70] the court's refusal to allow a tardy appeal graphically demonstrated that, in some cases, "ignorance of the law is no excuse."

Rule 48 was promulgated by the court in conjunction with its decision in *Moran v. Necaise*,[71] which was rendered September 28, 1983. The rule governs appeals of judgments, orders, and decrees entered on or after January 1, 1984.[72] Rule 48 requires a would-be appellant to file a notice of appeal with the clerk of the trial court within thirty days of entry of the judgment, order, or decree.[73]

This thirty-day requirement is inconsistent with section 11-51-5 of the Mississippi Code, which states that an appellant has 45 days in which to file an appeal.[74] In *Moran*, the court stated that Rule 48 would "provide for one (and only one) method of appeal to the Supreme Court of Mississippi."[75]

In *Clark*, the Mississippi Supreme Court considered a case in which appellants filed their appeal forty-two days after the judgment was entered.[76] The appellants' appeal complied with the appeals proce-

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[68] The language of MISS. R. CIV. P. 12(h) states that a defense of improper venue is waived: (1) if omitted from a Rule 12 motion or (2) "if it is neither made by a motion under this rule nor included in a responsive pleading . . . ." A defendant against whom a default judgment is rendered in a case factually dissimilar to *Belk* could well argue that the defense was not waived unless such a motion or pleading was in fact entered.

[69] 473 So. 2d 477 (Miss. 1985).

[70] 475 So. 2d 140 (Miss. 1985).

[71] 437 So. 2d 1222 (Miss. 1983).

[72] MISS. SUP. CT. R. 48(1).

[73] *Id.* at 48(b). For an analysis of Rule 48, see *1983 Mississippi Supreme Court Review: Civil Procedure*, 54 MISS. L.J. 73, 75-79 (1983)[hereinafter cited as *1983 Supreme Court Review*].

[74] MISS. CODE ANN. § 11-51-5 (Supp. 1985); *see also 1983 Supreme Court Review*, *supra* note 73, at 75 n. 21 (describing developmental history of statutory appeals time limit).

[75] *Moran*, 437 So. 2d at 1225.

[76] *Clark*, 473 So. 2d at 477. The final order from which the appeal had been taken

dure provided in the Mississippi Code,[77] but not with the procedure mandated by Rule 48. The trial had taken place less than two months after Rule 48 became effective.[78]

Because the trial had taken place during the period immediately after the rule took effect, the supreme court allowed the appeal in *Clark*.[79] The appeal had been filed during a period in which the court was exercising leniency regarding the rule.[80] Citing Rule 33 of the Mississippi Supreme Court Rules, which provides that the court's rules may be relaxed to avoid injustice or surprise,[81] the court granted an exception to the Rule 48 time limitation, and overruled the appellee's motion to dismiss the appeal.[82]

However, the appellants in *Landrum* were not as fortunate as were the appellants in *Clark*. In the *Landrum* case, judgment was rendered on January 18, 1985, more than twelve months after Rule 48 became effective.[83] Admitting that they had been unaware of Rule 48, the movants' attorneys requested the court to allow an out-of-time appeal.[84]

Noting that Rule 48 had been widely publicized,[85] the court declined to allow the tardy appeal. While recognizing that exceptional

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was entered March 5, 1984. The appellants perfected their appeal on April 16, 1984. *Id.* at 477-78.

[77] *Id.* at 478; *see supra* note 74.

[78] *Clark*, 473 So. 2d at 477. Rule 48 became effective January 1, 1984; the *Clark* trial was held February 22-24, 1984. *Id.*

[79] *Id.* at 478.

[80] *Id.* The appeal was not received by the court until April of 1985, due to delays in preparation of documents. However, the court noted that "[i]f the case had come before us promptly, the issue of compliance with Rule 48 would have been decided during the period where we routinely allowed some flexibility in enforcement of its provisions." *Id.*

[81] Miss. Sup. Ct. R. 33. Rule 33 has been applied in various cases in which the court allowed exceptions to its rules. *See, e.g.*, Fairley v. State, 343 So. 2d 483, 483 (Miss. 1977)(citing Rule 33, court reviewed entire record despite appellant's noncompliance with Miss. Sup. Ct. R. 16(d)); Mississippi Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 648-49, 112 So. 2d 222, 224 (1959)(citing Rule 33, court suspended enforcement of Miss. Sup. Ct. R. 19 in order to avoid "manifest injustice"); Richardson v. Cortner, 232 Miss. 885, 891, 105 So. 2d 456, 456 (1958)(same). *But see* Landrum v. Bailey, 475 So. 2d 140 (Miss. 1985)(discussed *infra* notes 83-93 and accompanying text); Carter v. Berry, 243 Miss. 321, 378-79, 142 So. 2d 13, 13-14 (1962)(court declined to suspend Miss. Sup. Ct. R. 14(3) by application of Rule 33).

[82] *Clark*, 473 So. 2d at 478.

[83] *Landrum*, 475 So. 2d at 141. Rule 48 became effective January 1, 1984; judgment was entered in the *Landrum* case on January 18, 1985. *Id.*

[84] *Id.*

[85] *Id.* at 140-41. Rule 48 was published as an appendix to *Moran*, 437 So. 2d at 1225-27; in Mississippi Supreme Court Rules, Mississippi Cases, 435-439 So. 2d at XXI; and in Mississippi Rules of Court (West pamph. 1984).

cases might exist in which the rule should not be strictly applied,[86] the court stated that enforcement of the rule was necessary in order to assure its utility.[87]

Justice Hawkins dissented to a subsequent denial of a petition for rehearing in the *Landrum* case.[88] Justice Hawkins distinguished statutes from rules of court, and noted that the latter are more flexible.[89] Citing Rule 33 of the Mississippi Supreme Court Rules,[90] the dissenting justice stated his opinion that the case was appropriate for permission of an out-of-time appeal.[91]

The *Clark* and *Landrum* decisions demonstrate that while the supreme court tolerated ignorance of Rule 48 for a period of time,[92] that time period has expired. There is only one procedural system by which a party may file an appeal to the court, and that system is created by Rule 48. If for no other reason, these decisions are worthy of note because an attorney who falls into the trap of relying upon the appeals procedures provided by the Mississippi Code almost surely commits malpractice.[93] Attorneys practicing in Mississippi must expect the state's supreme court to rigidly apply its own rules. While the fairness of this rigid application may be a matter of some debate, its binding effect is unassailable.

III. Rule 49: Amicus Curiae Briefs

In *Taylor v. Roberts*,[94] the Mississippi Supreme Court declined to

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[86] *Landrum*, 475 So. 2d at 141; *see supra* notes 76-82 (discussing waiver of time limit in *Clark*).

[87] *Landrum*, 475 So. 2d at 141.

[88] *Id.* at 141-42 (Hawkins, J., dissenting). Justice Walker joined in the dissent. Both justices who dissented from the denial of rehearing had concurred in the original opinion. *Id.* at 141.

[89] *Id.* at 141. Citing Mississippi State Highway Comm'n v. First Methodist Church, 323 So. 2d 92 (Miss. 1975), Mississippi State Highway Comm'n v. Brown, 250 Miss. 773, 162 So. 2d 508 (1964), and other cases, Justice Hawkins noted that failure to comply with appeals statutes can deprive the supreme court of jurisdiction. However, the dissenting justices stated that the attempted appeals in *Landrum* had violated "a rule of this Court, not a jurisdictional statute, and we have all the authority we want to exercise in deciding whether to enforce or suspend any rule of this Court." *Landrum*, 475 So. 2d at 141 (Hawkins, J., dissenting).

[90] *Landrum*, 475 So. 2d at 142 (Hawkins, J., dissenting); *see also supra* note 81 and accompanying text (discussing Miss. Sup. Ct. R. 33).

[91] *Landrum*, 475 So. 2d at 142 (Hawkins, J., dissenting).

[92] *See supra* notes 76-82 and accompanying text (discussing *Clark*).

[93] *See Landrum*, 475 So. 2d at 142 (Hawkins, J., dissenting)("Counsel in this case . . . were negligent"); *see also id.* at 141 (ignorance of rule found inexcusable).

[94] 475 So. 2d 150 (Miss. 1985).

allow the Mississippi Association of Realtors to file an amicus curiae brief.[95] The court reviewed the history of "friends of the court,"[96] noting the evolution of amicus briefs from disinterested advisory briefs into tools of advocacy.[97] Citing burdensome workloads and delay in disposition of cases,[98] the court reappraised its prior practice of liberally accepting amicus briefs that were timely submitted.[99] The court adopted specific guidelines by which it would determine whether amicus briefs would be accepted.[100]

Three weeks[101] after the *Taylor* decision was rendered, the court promulgated Rule 49 of the Mississippi Supreme Court Rules, entitled "Brief of an Amicus Curiae." Rule 49 adopted some of the same guide-

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[95] *Id.* at 151-52. The Mississippi Association of Realtors, Inc., filed a four-page brief in which only one case was cited. After adopting the criteria discussed below, the court determined that the brief failed to comply with the new standards. *Id.* at 152.

[96] *Id.* at 151; *see, e.g.*, Coney, *Amicus Curiae: Friend of the Court*, 9 DEPAUL L. REV. 30, 33 (1960)(discussing common-law origins of amicus curiae briefs); O'Connor and Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35, 41 (1983)(discussing use of amicus curiae briefs by lobbyists).

[97] *Taylor*, 75 So. 2d at 151.

[98] *Id.* at 152. The court noted that the Mississippi State Bar had suggested streamlining of rules in order to expedite disposition of cases. *Id.*

[99] *Id.* at 151-52; *cf.* New Orleans Baptist Theological Seminary v. Lacy, 219 So. 2d 673, 673 (Miss. 1969)(where parties were represented by able counsel, court declined to accept amicus brief filed after deadline expired).

[100] *Taylor*, 475 So. 2d at 152. Under the *Taylor* guidelines, one seeking to appear as amicus curiae was required to file a petition with the court, asserting one of the following reasons:

> (1) The would-be amicus has an interest in some other pending case involving a similar question; or
>
> (2) Counsel is inadequate or its brief insufficient; or
>
> (3) There are facts, circumstances or laws in the matters before the court that may otherwise escape the court's attention; or
>
> (4) The would-be amicus has substantial legitimate interests that will likely be affected by the case's outcome, and those interests will not be adequately protected by the parties to the case.

Id. The court created an exception by which the State of Mississippi could file any amicus brief sponsored by the State's Attorney General without obtaining permission from the court. In addition, the court imposed a requirement by which those filing amicus briefs were limited by the provisions of MISS. SUP. CT. R. 7. *Id.*

Any amicus briefs filed from or after January 1, 1986, must comply with the stricter requirements of Rule 49, rather than those of the *Taylor* case. *See infra* notes 102-109 and accompanying text.

[101] The *Taylor* decision was rendered August 21, 1985, and was applied immediately. Rule 49 was adopted September 9, 1985, and governs all amicus briefs filed from and after January 1, 1986.

lines as were set forth in the *Taylor* opinion.[102] In addition, the rule specified requirements related to time,[103] format,[104] service,[105] and length[106] of amicus briefs, as well as other procedural rules.[107] Some of these requirements are, in effect, inconsistent with the *Taylor* opinion.[108]

Rule 49 states that motions for leave to file amicus briefs are to be heard by three-judge panels. A dissenting panel vote requires review *en banc*.[109] Rule 49 governs all amicus briefs filed from and after January 1, 1986.[110]

Rule 49 will provide useful guidelines for those who wish to file amicus curiae briefs, and could reduce the number of such briefs filed

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[102] MISS. SUP. CT. R. 49. The four "reasons" set forth in the *Taylor* opinion were retained, as was the exception for briefs sponsored by the Attorney General. *See supra* note 100. In addition, the rule retains the requirement that the brief be attached to the petition of the would-be amicus. *Id.*

[103] MISS. SUP. CT. R. 49. The rule requires motions for leave to file amicus briefs to be filed no later than one month after the filing of appellant's or petitioner's brief. The *Taylor* case had merely required compliance with MISS. SUP. CT. R. 7, which does not clearly provide a time limit for filing of amicus curiae briefs. *Taylor*, 450 So. 2d at 152; MISS. SUP. CT. R. 7, 49.

[104] MISS. SUP. CT. R. 49. The rule requires the brief to "concisely state the nature of the applicant's interest, set forth facts or questions that have not been, or reasons for believing that they will not adequately be presented by the parties, and their relevance to the disposition of the case, as applicable." *Id.*

[105] *Id.* Rule 49 requires the motion and brief to be served upon all parties to the suit. In addition, the rule requires compliance with MISS. SUP. CT. R. 7, which mandates inclusion of a certificate showing delivery to opposing counsel, the trial judge, and, in criminal cases, the office of the prosecuting attorney general. MISS. SUP. CT. R. 49.

[106] MISS. SUP. CT. R. 49. The rule limits amicus briefs to no more than fifteen pages. Under the *Taylor* decision, however, the only limitation was compliance with MISS. SUP. CT. R. 7; therefore, *Taylor* would have allowed amicus briefs up to fifty pages long. *Taylor*, 450 So. 2d at 152; MISS. SUP. CT. R. 7.

[107] MISS. SUP. CT. R. 49. In addition to the requirements discussed *supra*, rule 49 allows the parties to the suit, at their option, to file a brief in response to the amicus. The response brief must be filed within five days, and may not exceed five pages in length.

In addition, Rule 49 expressly incorporates MISS. SUP. CT. R. 5 ("Records and Papers—How Filed"), 7 ("Briefs"), 8 ("Return Days"), and 28 ("Papers Not Filed After Submission"). *See* MISS. SUP. CT. R. 49.

[108] Rule 49 differs from the *Taylor* decision in time limitations, format provisions, service specifications, length limitations, provisions for parties to file briefs in response, express incorporation of certain other rules, and provisions for consideration by three-judge and, in some cases, *en banc* panels. *See supra* notes 103-107; *see infra* text accompanying note 109.

[109] MISS. SUP. CT. R. 49.

[110] *Id.*

in improper circumstances. However, it seems unlikely that the substantive requirements of the rule will reduce the actual number of briefs filed. Anyone wishing to appear as amicus will surely be able to categorize his position within one of the four "reasons"[111] required by the rule.

On the other hand, the technical and procedural requirements provided by Rule 49[112] are likely to provide a new trap for unwary parties who would otherwise be worthy of consideration as amicus curiae. These procedural roadblocks are concealed particularly to the extent that they appear in Rule 49, but not in the published opinion of *Taylor v. Roberts*.[113]

In addition, one may wonder why, in a step taken to "streamline rules to expedite disposition of cases,"[114] the court has imposed upon itself the requirement for hearings by three-judge panels, and even for hearings *en banc*.[115] The court's purposes may have been better suited by leaving this in-house procedure unspecified, and therefore open to development through experience.

Interests of fairness and equity may require the court to exercise some leniency in enforcing Rule 49. If the court will follow its own example from the adoption of Rule 48,[116] by assuring broad publication of Rule 49[117] and providing a lenient "break-in" period prior to its strict enforcement, this rule will be successfully assimilated into Mississippi practice.

IV. Ancillary Jurisdiction—Circuit Court Power to Determine Equitable Claims

In *Hall v. Corbin*,[118] the Mississippi Supreme Court held that the Circuit Court of Warren County had acted properly when, in a replevin action, it retained an intervenor's claim after the intervenor renounced any possessory interest in the property that was the subject of the re-

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[111] *See supra* note 100.

[112] *See supra* notes 103-107.

[113] *See supra* note 108. The *Taylor* decision, rendered August 21, 1985, was effective immediately; Rule 49 took effect January 1, 1986. Therefore, it could well be argued that any amicus petitions filed between these dates were required only to meet the less demanding requirements of *Taylor*.

[114] *Taylor*, 450 So. 2d at 152.

[115] *Id.* It would seem that these procedural requirements imposed by the court upon itself might in fact serve to increase, rather than decrease, its workload.

[116] *See supra* notes 79-82 and accompanying text.

[117] Rule 49 has been published in Mississippi Rules of Court (West pamph. 1985).

[118] 478 So. 2d 253 (Miss. 1985).

plevin action. Subsequently, the intervenor was granted an equitable lien in the property.

The appellant, W.C. Hall, filed a "complaint in replevin"[119] in circuit court seeking to recover possession of an automobile from Jetton and Corbin.[120] Hall's wife, Linnie, filed a motion to intervene,[121] asserting both a possessory interest in the automobile and a right to an equitable lien against it.[122] The lower court allowed the intervention, stating that the intervenor's claims and the replevin action had common questions of law and fact.[123]

Upon Linnie Hall's subsequent death, the circuit court allowed the executor of her estate to intervene[124] and to adopt the original intervention complaint. At trial, the estate conceded it had no claim in a possessory interest in the car.[125] At the conclusion of the trial, the court awarded possession of the automobile to W.C. Hall, but granted an equitable lien to Linnie Hall's estate.[126]

On appeal, the supreme court considered two questions: (1) whether the intervention was properly permitted under Mississippi's replevin statutes and Rules of Civil Procedure, and (2) whether it was within the jurisdiction of the circuit court to grant the equitable lien.[127]

Addressing the issue of whether the intervention was proper, the

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[119] *Id.* at 254. Hall complied with statutory replevin requirements. *Id.* Replevin statutes are located at MISS. CODE ANN. §§ 11-37-101 to -157 (Supp. 1985). A claimant seeking to commence a replevin action is required to file a declaration under oath setting forth that he is entitled to immediate possession of specified personal property. MISS. CODE ANN. § 11-37-101(a),(c)(Supp. 1985).

[120] *Hall*, 478 So. 2d at 254. Hall had previously given Jetton permission to use the car. The petition alleged that the car was at Corbin's residence. *Id.*

[121] *Id.*

[122] *Id.* Linnie Hall based her claim upon an assertion that W.C. Hall had used Linnie's money to buy the car without obtaining her permission. Therefore, Linnie sought a lien in the amount of the misused funds. *Id.*

[123] *Id.* The trial court's finding that the intervenor's "claim and defense and the main action of replevin ha[d] a question of law and fact in common" corresponded with the criteria set forth in MISS. R. CIV. P. 24(b), entitled "permissive intervention." The supreme court therefore presumed that the trial court had proceeded under that rule. *Hall*, 478 So. 2d at 256.

[124] *Hall*, 478 So. 2d at 254. The executor asserted the decedent's replevin claim pursuant to the applicable statutes. *See* MISS. CODE ANN. § 11-37-153 ("Laws applicable in case of death" included in replevin chapter of the Code); *id.* § 91-7-233 ("What actions survive to executor"). *Hall*, 478 So. 2d at 255.

[125] *Hall*, 478 So. 2d at 254.

[126] *Id.*

[127] *Id.* These issues arose from Hall's assignment of error, which asserted "that the trial court exceeded its jurisdiction to allow [the executor] to intervene . . . where he did not claim possession and awarding an equitable lien to the estate." *Id.*

court noted that prior to the adoption of the Mississippi Rules of Civil Procedure, replevin was purely statutory. Under the statutory procedure, the court had held that the circuit courts could not administer equity in replevin actions.[128] The court in *Hall* stated that this rule was obtained not because such claims were beyond the subject matter jurisdiction of the circuit courts, but rather because those courts lacked the procedural mechanisms necessary to assert the claims.[129]

In determining whether the Mississippi Rules of Civil Procedure applied to the action, the court analyzed Rule 64 of the Mississippi Rules of Civil Procedure,[130] which specifically refers to replevin.[131] The court had previously held that garnishment proceedings[132] and pre-judgment attachment proceedings[133] were governed by the rules only to the extent that the rules were not inconsistent with the statutory schemes for those proceedings.[134] By analogy, the *Hall* court held that replevin proceedings were governed by the replevin statutes,[135] and were supplemented by the Mississippi Rules of Civil Procedure only to the extent that the rules and statutes were not inconsistent.[136] The court then determined that Rule 24, which is the procedural rule governing intervention,[137] was supplementary to the intervention statutes

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[128] *See* Myers v. Daughdrill, 163 Miss. 298, 303, 141 So. 583, 584 (1932)("obviously a circuit court in an action of replevin cannot administer equity or apply principles cognizable only in equity.").

[129] *Hall*, 478 So. 2d at 255.

[130] *Id.* at 256. Miss. R. Civ. P. 64, entitled "seizure of person or property," states that:

> [A]ll remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law . . . regardless of whether the remedy is ancillary to an action or must be obtained by an independent action.

Miss. R. Civ. P. 64. The court did not expressly state whether after the *Hall* decision there still exists any remedy that must be obtained by an independent action, or whether instead all boundaries preventing joinder of related claims and of various types of actions are to be removed.

[131] Miss. R. Civ. P. 64 specifically refers to "attachment, garnishment, replevin, claim and delivery, sequestration and other corresponding or equivalent remedies." *Id.*

[132] *See* First Miss. Nat'l Bank v. KLH Indus., 457 So. 2d 1333, 1337 (Miss. 1984)(Rule 64 has no application to post-judgment garnishment proceedings, which are instead governed by statute).

[133] *See* Universal Computer Servs. v. Lyall, 464 So. 2d 69, 73 (Miss. 1985)(pre-judgment attachment proceedings are governed by statute).

[134] *Hall*, 478 So. 2d at 256.

[135] *See supra* note 119 (citing replevin statutes).

[136] *Hall*, 478 So. 2d at 256.

[137] Miss. R. Civ. P. 24. The comment to Rule 24 states that "Rule 24 is, in practical

rather than inconsistent with them.[138] Therefore, the trial judge had acted properly in applying Rule 24 to determine whether Linnie Hall should be allowed to intervene.[139] Because an analysis of Mrs. Hall's claim at the time it was filed under Rule 24 indicated that intervention would be proper,[140] the court held that the trial judge had correctly allowed the intervention,[141] and that the lower court had thereby obtained jurisdiction over the intervention.[142]

Having determined that the circuit court had jurisdiction of the intervenor's claim, the supreme court addressed the issue of whether such jurisdiction was retained even after it was determined that the intervenor had no possessory interest in the subject matter of the dispute.[143] The court held that, through the concept of ancillary jurisdiction,[144] the intervenor's claim remained properly before the circuit court even after it became apparent that the intervenor had no claim to a possessory interest in the subject matter of the dispute.[145]

The court then applied its concept of ancillary jurisdiction to answer the second issue before it: whether the circuit court had acted beyond the scope of its jurisdiction in granting the intervenor an equitable remedy.[146] Citing cases in which it had held that chancery courts were empowered to hear "legal claims" by way of pendent or ancillary jurisdiction,[147] the court held that, conversely, "where a circuit court

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effect, substantially the equivalent of traditional Mississippi practice in the area of intervention . . . . However, the rule gives law courts intervention powers formerly accorded only to courts of equity." MISS. R. CIV. P. 24 comment (printed in MISSISSIPPI RULES OF COURT, 1985 DESK COPY 62 (West pamph. 1985)).

[138] *Hall*, 478 So. 2d at 256. The court supported this position by noting that while MISS. CODE ANN. § 11-37-49 "mandates intervention by those claiming a possessory interest in the subject property, it does not by its terms preclude the adjudication of other issues between the parties, especially as those issues relate to the subject property." *Hall*, 478 So. 2d at 256-57.

[139] *Id.* at 257.

[140] *Id.* at 255. The court based its finding that Linnie's intervention was proper not upon facts meeting the statutory requirements, but upon her allegations of such facts. *Id.*

[141] *Id.* at 256-57.

[142] *Id.* at 257.

[143] *Id.* at 254. At trial, the estate conceded that it had no possessory interest in the property. *Id.*

[144] *Id.* at 255. The court stated that claims arising out of the same transaction or occurrence, or out of a common nucleus of operative fact, fall within ancillary or pendent jurisdiction; and that once a court has subject matter jurisdiction, it may adjudicate ancillary or pendent claims. *Id.*

[145] *See id.* at 255, 257.

[146] *Id.* at 255.

[147] The court cited Tideway Oil Programs v. Serio, 431 So. 2d 454, 464 (Miss. 1983)

has jurisdiction of an action at law, it may hear and adjudicate in that action all claims, including those with an equitable smell, arising out of the same transaction or occurrence as the principle claim."[148] Therefore, the court held that a circuit court could grant equitable relief to an intervenor in a replevin action, even though the intervenor was unable to correctly assert a possessory interest in the subject matter property of the original replevin action.

Presiding Justice Walker dissented, joined by Justice Hawkins.[149] The dissenting justices noted that because the circuit courts are created by statute,[150] they have only the power conferred on them by statute.[151] They further noted that because equitable liens can only be administered by courts of equity,[152] this function was limited to the chancery courts in Mississippi. In addition, the dissenters believed that the majority had effectively applied the Mississippi Rules of Civil Procedure to extend the jurisdiction of the circuit courts in direct contradiction of Rule 82(a).[153] In conclusion, Justice Walker stated his belief that *Hall v. Corbin* was a part of a continuing effort to abolish the distinction between the chancery and circuit courts.[154] The dissenters believed that such an effort should be undertaken by the legislative rather than the judicial branch of government.[155]

In *Hall v. Corbin*, the Mississippi Supreme Court has done a re-

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and Burnett v. Bass, 152 Miss. 517, 521, 120 So. 456, 457 (1929). *Hall*, 478 So. 2d at 255.

[148] *Hall*, 478 So. 2d at 255.

[149] *Id.* at 257.

[150] *Id.* (Hawkins, J., dissenting); *see* MISS. CODE ANN. § 9-7-3 (Supp. 1985)(creating circuit courts); *see also id.* §§ 9-7-81 to -95 (describing subject matter jurisdiction of circuit courts).

[151] *Hall*, 478 So. 2d at 257 (Hawkins, J., dissenting).

[152] *Id.* at 258. Justice Hawkins stated that "[t]he establishment of equitable liens has historically been the province of the chancery court, and the circuit court has no such jurisdiction—whether it be original, ancillary, or pendent!" *Id.*

[153] *Id.* at 257. MISS. R. CIV. P. 82(a) states that the rules "shall not be construed to extend or limit the jurisdiction of the courts of Mississippi." The majority in *Hall* noted this provision, but skirted it by application of circular reasoning as follows: The court cannot apply the rules in such a way as to extend the circuit courts' jurisdiciton, and this decision was reached by application of the rules; therefore, this decision must not be one that extends the jurisdiction. *Id.* at 255.

[154] *Hall*, 478 So. 2d at 258 (Hawkins, J., dissenting). Combined with the decisions of Tideway Oil Programs v. Serio, 431 So. 2d 454 (Miss. 1983), and the First Miss. Nat'l Bank v. KLH Indus., 457 So. 2d 1333 (Miss. 1984), Justice Hawkins believed that the majority opinion represented "a well-charted course leading to the abolishment of any distinction between the circuit and chancery courts." *Hall*, 478 So. 2d at 258 (Hawkins, J., dissenting). *See supra* notes 147 and 132 (*Tideway Oil* and *KLH Indus.* opinions).

[155] *Hall* 478 So. 2d at 258.

markable job of bootstrapping an equitable claim into circuit court. The court was faced with a situation in which the statutory replevin provisions allowed intervention by a third person who claimed a possessory interest in the property that was the subject of the replevin action. Replevin procedures exist in order to allow determination of rights of possession of property.[156] An action of replevin is not suited for determination of another person's equitable claim against the property. It is a specialized proceeding meant to determine a particular issue. The Mississippi Supreme Court had previously held that a party with a nonpossessory lien may not intervene in a replevin action, but instead must seek his relief in equity.[157] The *Hall* court chose to ignore this precedent rather than address it.

In this case, the intervenor gained entry into the proceeding by misrepresenting[158] its claim as one of a possessory interest in the property. The supreme court held that this misrepresentation was effective in placing the intervention properly before the circuit court in such a manner that any other related claim was within the court's ancillary jurisdiction. It is not difficult to understand the dissenting justices' suspicion that the purpose of this decision is to change the structure of the state's court system. If this was not the majority's objective, one must wonder whether the decision in *Hall v. Corbin* has served any useful purpose at all.

V. Conclusion

The cases included in this discussion represent efforts by the court to bring order to Mississippi's procedural law. This is a purpose worthy of the court's attention.

Unfortunately, predicting any given decision during this period of flux requires interpretation of conflicting signals. For example, the

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[156] *See, e.g.*, General Motors Acceptance Corp. v. Fairley, 359 So. 2d 1386, 1388 (Miss. 1978)(replevin action is one for specific property, not for monetary damages); Robinson v. Friendly Fin. Co., 241 Miss. 239, 242, 130 So. 2d 256, 257 (1961)(replevin is purely an action for possession).

[157] Shoemake v. Federal Credit Co., 188 Miss. 683, 689-90, 192 So. 561, 562-63 (1940)(one seeking to assert equitable lien against property subject to replevin action may not do so by intervening in replevin suit). The court in *Shoemake* stated that to allow assertion of a nonpossessory interest in a replevin action "would not be to construe the statute, but under the guise of construction to amend it . . . ." *Id.* at 690, 192 So. at 562.

[158] *See Hall*, 478 So. 2d at 254 (estate conceded that it had no possessory interest). There is no indication in the *Hall* opinion whether the misrepresentation was inadvertent or intentional.

court has held in some areas that rules supersede statutes,[159] while in other areas the converse is true.[160]

Because of the uncertain nature of some aspects of the law of civil procedure, the authors feel compelled to recommend that Mississippi practitioners exercise caution almost to the point of excess. Rather than attempt to guess whether a procedural method is governed by statutes, rules, or common law, we suggest that the wiser method would be to attempt, wherever feasible, to comply with requirements of all three. We admit that this approach provides no definitive rule; however, this seems to reflect the uncertainties demonstrated by recent decisions.

Cheri D. Green and William F. Ray

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[159] *See supra* notes 74-75 and accompanying text.

[160] *See supra* notes 132-33 and accompanying text.

CONTRACTS AND COMMERCIAL LAW

I. Contracts

In 1985 the Mississippi Supreme Court heard seven cases dealing with the law of contracts. The decisions pertaining to joint ventures[1] and parol evidence[2] will be analyzed textually. Other decisions not treated here dealt with option contracts,[3] public contracts,[4] language construction,[5] and sovereign immunity.[6] Additionally, the court rendered two opinions relating to corporate law.[7]

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[1] Keppner v. Gulf Shores, Inc., 462 So. 2d 719 (Miss. 1985); *see also* Hults v. Tillman, 480 So. 2d 1134 (Miss. 1985); *see infra* notes 8-45 and accompanying text.

[2] Smith v. Falke, 474 So. 2d 1044 (Miss. 1985); *see infra* notes 46-57 and accompanying text.

[3] *See* Busching v. Griffing, 465 So. 2d 1037, 1037 (Miss. 1985)(land option contract which failed to specify method of purchase price payment was ambiguous, reversing 12(b)(6) motion).

[4] *See* Aetna Casualty & Sur. Co. v. Doleac Elec. Co., 471 So. 2d 325, 329 (Miss. 1985)(co-prime contractor must publish notice of pendency of suit against surety of another co-prime contractor as jurisdictional prerequisite). In a supervisory capacity, the court determined that the surety was liable for additional labor costs and home office overhead, but not for loss of profit or prejudgment interest. *Id.* at 329-31. The court also disallowed attorney's fees, which could be properly awarded only where the recovery of punitive damages was justified. *Id.* at 331-32.

[5] *See* City of Jackson v. Richland Water & Sewer Dist., 475 So. 2d 143, 144 (Miss. 1985)(concept of "regional sewer system" in sewage treatment contract was properly allowed into evidence).

[6] Mississippi State Bldg. Comm'n v. S & S Moving, Inc., 475 So. 2d 159 (Miss. 1985). The court found a waiver of sovereign immunity by the Building Commission due to its requested jury instructions: "[I]f you find . . . that no required surety bond was posted, then the . . . Commission is obligated to pay the claims. . . ." *Id.* at 161. The court also determined that Miss. Code Ann. § 11-45-1 (1972), which requires a demand against the Auditor of Public Accounts before bringing suit against the state, did not apply because the auditor lacked the authority to act on a damages claim in a breach of contract case. *Mississippi State Building Comm'n*, 475 So. 2d at 162.

[7] Allgood v. Bradford, 473 So. 2d 402 (Miss. 1985), dealt with orphanage trustees seeking declaratory relief against officers of the church who founded the orphanage. The most significant aspect of the case is that the term "members" of a nonprofit corporation was defined by the court. Drawing from statutory authority, the court stated that "members are those who bring the corporation into being, vote for corporate officers, vote to dissolve the corporation, and on dissolution receive the assets of the corporation." *Id.* at 412. The court held that since the "members" were the orphanage trustees and not the church officers, the trustees had the authority to amend the orphanage charter. *Id.* at 413.

In Mathews Brake Hunting & Fishing Club, Inc. v. Sneed, 475 So. 2d 811 (Miss.

A. Joint Ventures

The law of joint ventures received extensive treatment by the state's highest court in two important decisions. In *Keppner v. Gulf Shores*,[8] three corporations—Gulf Shores, Inc., Wen Coast-Wendelta (Wendy's), and the Omelette Shoppe—jointly agreed to construct a sewage disposal system for their respective facilities.[9] Subsequent to the Omelette Shoppe's bankruptcy, the Gulfport Sheraton Inn (Sheraton) purchased the Omelette Shoppe property, which included an easement giving access to the land of Gulf Shores.[10] When Sheraton began discharging its waste into the system, Gulf Shores and Wendy's secured a permanent injunction prohibiting excessive disposal.[11]

On appeal, Sheraton contended that the Omelette Shoppe property purchase was not subject to the terms of the joint venture agreement.[12] The court, however, first found that a joint venture had been established between the original parties because there was joint purpose and proprietary control.[13] The court then rejected Sheraton's as-

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1985), the court upheld the chancellor's finding that the repurchase price of the hunting club's share was grossly inadequate. *Id.* at 813.

[8] 462 So. 2d 719 (Miss. 1985).

[9] *Id.* at 721. The three businesses owned adjoining properties on U.S. Highway 49 in Gulfport. The sewage plant consisted of a lift station, collection lines, and a discharge line. The parties also agreed to build a water main for their use, and all maintenance costs of the system were to be divided evenly. The corporations signed an unrecorded document stating their intentions on November 11, 1979. *Id.*

[10] *Id.* The perpetual easement agreement between the three original parties provided that in exchange for the easement, Gulf Shores was granted the right to connect its sewer lines to the Omelette Shoppe lines. *Id.* at 724. The Omelette Shoppe realty was purchased by the owner of the adjoining Sheraton, Michael Shular, who was unaware of the joint agreement to build the sewage system. *Id.* at 721. However, Shular believed the recently constructed lift station was part of the newly acquired property. *Id.* at 721-22.

[11] *Id.* at 722. Upon learning of Sheraton's actions, Gulf Shores sent two letters to Shular in protest. After these letters went unanswered, Gulf Shores and Wendy's sought to enjoin Sheraton's use as a trespass to their rights. Following a trial on the merits, the Chancery Court of Harrison County held that Shular succeeded only to the interest of the Omelette Shoppe, and could not discharge its sewage in excess of Omelette Shoppe's estimated usage. *Id.*

[12] *Id.* at 721.

[13] *Id.* at 723. The concept of joint ventures was created by the courts of the United States. Tompkins v. Commissioner of Internal Revenue, 97 F.2d 396, 398 (4th Cir. 1938). The leading Mississippi case on the subject is Sample v. Romine, 193 Miss. 706, 8 So. 2d 257 (1942). In *Sample*, the court observed that no exact definition of a joint venture could be given, the characterization in each case depending on the terms of the agreement, the acts of the parties, the nature of the undertaking and other facts. *Id.* at 726, 8 So. 2d at 260. A joint venture was broadly defined as "an association of persons to carry out a single business enterprise for profit, for which purpose they combine their prop-

serted status as an innocent third-party purchaser,[14] reasoning that the language of the easement was sufficient to place Sheraton on notice.[15]

Sheraton also argued that the joint venture agreement between the original parties was terminated when the Omelette shoppe became bankrupt.[16] Although the Mississippi Uniform Partnership Law would have yielded this result as to a traditional partnership,[17] the court decided that "section 79-12-61[(5)] relating to bankruptcy as a cause of dissolution, [did] not necessarily apply to [the] joint [venture at bar]."[18] Looking at analogous cases from other jurisdictions,[19] the court

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erty, money, effects, skill and knowledge." *Id.* The *Sample* court noted that a joint venture exists when there is a combination for the mutual benefit of two or more persons, with the understanding that all are to share in profits or losses and have a voice in management. *Id.* at 726, 8 So. 2d at 260-61. As a precedent for its existence, the joint venture must show a joint purpose and proprietary interest and control. *Id.* at 726-27; 8 So. 2d at 261.

The *Keppner* court found these requirements in the joint agreement, since Wendy's, Gulf Shores, and the Omelette Shoppe had agreed to share all costs of the system for the benefit of all parties. *Keppner*, 462 So. 2d at 722-23.

[14] *Keppner*, 462 So. 2d at 724. According to established joint venture law, a trust is imposed upon the joint venture property until it passes into the hands of a bona-fide purchaser. When the innocent party takes possession, the trust is terminated. Sample v. Romine, 193 Miss. 706, 729-30, 8 So. 2d 257, 262 (1942).

[15] *Keppner*, 462 So. 2d at 724; *see* Dead River Fishing & Hunting Club v. Stovall, 147 Miss. 385, 395-96, 113 So. 336, 337-38 (1927)(purchaser of land has duty to take notice of any recitals in deed; if recital puts reasonably prudent man on inquiry, constructive notice occurs). Applying the rule of *Stovall*, the *Keppner* court reasoned that since the Omelette Shoppe deed referred specifically to the easement, which was recorded, Sheraton could not claim the status of an innocent purchaser. *Keppner*, 462 So. 2d at 724; *see supra* note 10 (*Keppner* easement agreement).

[16] *Keppner*, 462 So. 2d at 723.

[17] *See* Miss. Code Ann. § 79-12-61(5)(Supp. 1985)(partnership is dissolved by bankruptcy of any partner). Sheraton contended that since the joint venture had terminated, Shular did not purchase the Omelette Shoppe property subject to the agreement. *Keppner*, 462 So. 2d at 723.

[18] *Keppner*, 462 So. 2d at 723. A partnership is defined under the Mississippi Uniform Partnership Law, Miss. Code Ann. §§ 79-12-1 to -85 (Supp. 1985), as "an association of two (2) or more persons to carry on as co-owners of a business for profit." *Id.* § 79-12-11(1)(Supp. 1985). The court held that since the joint venture at bar was not a "business for profit," it was not a partnership. *Keppner*, 462 So. 2d at 723. *But see* Hults v. Tillman, 480 So. 2d 1134, 1145 (Miss. 1985)(Uniform Partnership Act now applied to joint ventures). The *Hults* opinion has been textually treated. *See infra* notes 24-45 and accompanying text.

[19] *Keppner*, 462 So. 2d at 723-24; *see* Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 549 (1928)(assignment of interest by joint venturer did not terminate joint venture); Salem-Fairfield Telephone Ass'n v. McMahan, 78 Or. 471, 153 P. 788, 789-90 (1915)(same); Kaufman v. Catzen, 100 W. Va. 79, 130 S.E. 292, 294-95 (1925)(contract for joint venture was not terminated by one venturer's refusal to perform).

held that the termination of a joint venture when one joint venturer became insolvent would turn upon proper construction of the agreement.[20] The court reasoned that since the agreement contained no expiration date and provided for maintenance costs sharing by the owners "and any subsequent users," the parties intended an ongoing association.[21] Therefore, the limitation placed upon Sheraton's use of the lift station by the chancellor was modified.[22] Other assignments of error were dismissed.[23]

The value of *Keppner* as precedent has probably been diminished by the later opinion of *Hults v. Tillman*.[24] Howard Hults and his wife owned several hundred acres of land near the Alabama state line.[25] In February of 1980, Hults and his attorney, Henry Tillman, discussed the prospect of selling fill dirt from that tract.[26] On August 8, 1980, Tillman executed a nonexclusive royalty agreement to Mid-State James Paving Company, through which Tillman, under the authority of Hults, agreed to sell dirt to Mid-State for $0.25 a yard.[27] On December 12, 1980, Hults and his wife executed a lease agreement to two dirt contractors.[28] At this time Hults and Tillman agreed that Tillman would receive one-third of the proceeds of the contract.[29]

On January 9, 1981, the Hultses authorized the dirt contractors to make all payments pursuant to the lease agreement to Tillman, who

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[20] *Keppner*, 462 So. 2d at 723; *see* Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1979)(court looked to default clause in joint venture agreement); Cohen v. Lansburgh, 366 So. 2d 154, 155-56 (Fla. App. 1979)(joint venture terminated by terms of agreement).

[21] *Keppner*, 462 So. 2d at 723-24.

[22] *Id.* at 725. The court reasoned that since Sheraton owned one-third of the rights in the sewage system, the hotel should be allowed to use one-third of the lift station's capacity. *Id.*

[23] *Id.* at 725-26. The court found admission of testimony concerning the purpose of the agreement did not violate the parol evidence rule. *Id.* at 725. The court also affirmed the chancellor's finding that a trespass was committed. *Id.*

[24] 480 So. 2d 1134 (Miss. 1985).

[25] *Id.* at 1136.

[26] *Id.* Tillman testified that they agreed in March of 1980 to divide the proceeds 60% to Hults and 40% to Tillman. Hults testified that although Tillman was to be paid on a contingency fee basis, the actual percentage was not discussed until December 1980. Tillman expended considerable time and effort during 1980 to secure the fill dirt contract. *Id.*

[27] *Id.* at 1137. A few weeks later Hults assigned the right to negotiate the sale of fill dirt to Tillman. *Id.*

[28] *Id.* at 1138. The agreement authorized the dirt contractor lessees, Patterson Enterprises, Ltd., and T. L. James Co., to excavate dirt and compensate the Hultses at the rate of $0.25 a yard. *Id.*

[29] *Id.*

would then forward the payments to Hults.[30] Hults regularly wrote Tillman a personal check for one-third of the proceeds, with the payment designated as attorney fees.[31] When Hults terminated Tillman's services in September, Tillman filed a complaint alleging that he and Hults were joint venturers in the dirt excavation contract.[32] The chancellor concluded that a joint venture existed because each of the parties had mutual obligations which they performed, and because there was a division of the proceeds.[33]

On appeal, the Mississippi Supreme Court distilled all contentions into one issue: whether the agreement between Hults and Tillman constituted a joint venture.[34] The court decided that the agreement did not constitute such a venture for two reasons. Initially, the court determined that although a joint venture may be inferred from the conduct of the parties, there must be conduct which evidences actual intent to form a joint venture.[35] The court reasoned that Tillman did not consider himself to be a joint venturer because he expressed no intention to be included in the lease agreement between the Hultses and the dirt contractors. Furthermore, Tillman's conduct with regard to the royalty agreement was evidence of an agency relationship.[36] Therefore, the court concluded, no actual intent existed to form a joint venture.[37]

Acknowledging that other states have applied the Uniform Partnership Act to joint ventures, and that a joint venture is essentially a miniature partnership, the court next turned to the Mississippi Uni-

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[30] *Id.* at 1138.

[31] *Id.* at 1139. A number of the check stubs were designated as being in payment for attorney's fees. Furthermore, Hults's secretary testified that she was told by her employer that these payments were to be treated as such. *Id.*

[32] *Id.* at 1140. Tillman asked for damages of one-third of any proceeds due him. *Id.* Tillman maintained his position as a joint venturer throughout the proceedings. *Id.* at 1141 n.4.

[33] *Id.* at 1140-41, 1144.

[34] *Id.* at 1141, 1144. Citing Sample v. Romine, 193 Miss. 706, 8 So. 2d 257 (1942), the court first recited the general principles of joint venture law. *See supra* note 13. The court also cited State *ex rel* Crane v. Stokke, 65 S.D. 207, 272 N.W. 811 (1937), for the principle that the term "joint venture" was first used to describe the *use* of the relationship. The *Hults* court summarized by stating that "a joint venture might be characterized as a single shot partnership." *Hults*, 480 So. 2d at 1143.

[35] *Hults*, 480 So. 2d at 1143; *see* Fewell v. American Sur., 80 Miss. 782, 793, 28 So. 755, 757 (1902)(intent is necessary to form joint venture or partnership). In all negotiations and agreements, Tillman's position was that of attorney for Hults. *Hults*, 480 So. 2d at 1143-44.

[36] *Hults*, 480 So. 2d at 1144.

[37] *Id.*

form Partnership Law.[38] Section 79-12-11(1) of the Mississippi Code defines "partnership" as "an association for two (2) or more persons to carry on as co-owners a business for profit."[39] The court determined that Hults and Tillman did not fall within this statutory definition "because they did not carry on the undertaking as co-owners. Tillman represented Hults, and performed services. However, there is nothing to suggest he did anything more than act as agent and/or attorney."[40]

Under the reasoning of the *Hults* decision, it is probable that the result in *Keppner* would be different. Since the Uniform Partnership Act provides for dissolution in the event of bankruptcy,[41] the Omelette Shoppe's insolvency would serve to terminate the Gulf Shores joint venture.[42] However, the *Keppner* court chose not to apply the above provision and drew a distinction between a joint venture for mutual benefit and one for profit.[43] Specifically, the court stated, "Since the association in the case sub judice is not a 'business for profit,' it is

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[38] *Id.* at 1144-45. The Uniform Partnership Act [hereinafter cited as UPA] was adopted by Mississippi in 1976. *See* MISS. CODE ANN. §§79-12-1 to -85 (Supp. 1985)(Mississippi Uniform Partnership Law).

Other states finding applicability include Illinois, Texas, Oregon, and Hawaii. *See, e.g.*, Federal Deposit Ins. Corp. v. Braemoor Assocs. 686 F.2d 550, 556 (7th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983)(joint venture of individuals subject to UPA); Lau v. Valu-Bilt Homes, Ltd., 59 Hawaii 283, 582 P.2d 195, 200-01 (1978)(partnership rules applicable to joint ventures); Hayes v. Killinger, 235 Or. 465, 385 P.2d 747, 750 (1963)(court distinguished joint venture from partnership in that joint venture is generally limited to single transaction, whereas partnership is entered into for general business purposes; notwithstanding this difference, court found partnership rules applicable to determining existence of joint venture); Thompson v. Thompson, 500 S.W.2d 203, 209 (Tex. Civ. App. 1973)(partnership rules applicable to joint venture).

[39] *Hults*, 480 So. 2d at 1145.

[40] *Id.* The court reasoned that being co-owners in a partnership was synonymous with the joint proprietary interest requirement of *Sample v. Romine*. *Id.* at 1142, 1145.

The court found that the following provisions of the Uniform Partnership Act showed evidence of no joint venture: MISS. CODE ANN. § 79-12-11(1)(Supp. 1984)(partners must carry on undertaking as co-owners); § 79-12-13(3)(sharing of gross returns does not in itself constitute partnership); § 79-12-13(4)(b)(sharing of profits does not in itself constitute partnership if share is in nature of wages or compensation for services rendered); § 79-12-35(a)(b)(requirement of sharing in losses and expenses). *Id.*

A legitimate argument could be made that this portion of the opinion is largely dicta, since the inquiry into the intent of the parties had revealed that no joint venture resulted.

[41] *See supra* note 17.

[42] This assumes that a joint venture for mutual benefit, similar to that of *Keppner*, would not be classified as an exception to *Hult*. *See supra* note 38 and accompanying text.

[43] *Keppner*, 462 So. 2d at 723.

therefore not a partnership as defined by the statute."[44] This confusing distinction could have been avoided by recognizing that a "benefit" is essentially a "profit."[45] Under such an analysis, *Keppner* would be reconcilable with *Hults*.

B. Application of Parol Evidence to Release Contracts

The Mississippi Supreme Court admitted parol evidence for a release of a joint tortfeasor in *Smith v. Falke*.[46] Mary Smith, plaintiff in an automobile accident,[47] agreed to release one of the joint tortfeasors, Guy Gunter, for consideration.[48] When the original release could not be located, Smith signed what she assumed to be a duplicate release. However, Smith actually released the other tortfeasor, Daniel Falke.[49] In granting Falke's motion to dismiss, the trial court refused to admit parol evidence to show that both parties to the release intended to release only Gunter.[50]

On appeal, the court avoided strict enforcement of the parol evidence rule, holding that the rule applies only to controversies between parties to the agreement and those claiming under them.[51] The court cited *National Cash Register Co. v. Webb*,[52] which held that parol evidence does not apply to a stranger to a contract.[53] Falke's contention that he was a third-party beneficiary of the release[54] was dismissed by

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[44] *Id.*

[45] *See* Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841, 843 (1980)("profit" in North Carolina UPA relates to purpose of business and not whether business actually produced net gain); *see also* Labor Discount Center v. State Bank & Trust Co., 526 S.W.2d 407, 424 (Mo. App. 1975)(for joint ventures, "profit" is benefit or advantage remaining after expenses are deducted from income).

[46] 474 So. 2d 1044 (Miss. 1985).

[47] *Id.* at 1045. Smith's car was struck from the rear by a vehicle driven by Daniel Falke, which had just been struck from behind by Guy Gunter. *Id.* Both Falke and Gunter were minors. *Id.* at 1044.

[48] *Id.* at 1045. Smith released Gunter and his parents for a payment of $10,000, their maximum liability insurance coverage. *Id.*

[49] *Id.*

[50] *Id.* The lower court disallowed any parol testimony, citing the general rule of inadmissibility when the language is clear and unambiguous. *Id.* at 1045-46; *see* Valley Mills v. Southeastern Hatcheries, 245 Miss. 71, 79, 145 So. 2d 698, 701-02 (1962)(parol evidence cannot contradict unambiguous written contracts).

[51] *Smith*, 474 So. 2d at 1046.

[52] 194 Miss. 626, 11 So. 2d 205 (1942).

[53] *Id.* at 629, 11 So. 2d at 205. Although the *National Cash Register* decision dealt with a general contract and not a release instrument, the court stated the result would be the same. *Smith*, 474 So. 2d at 1046.

[54] *Smith*, 474 So. 2d at 1047. Falke claimed that he was a third-party beneficiary of

the court, since there was no intent to release Falke.[55]

In extending the *National Cash Register* decision to encompass release contracts, the court added Mississippi to the list of several jurisdictions that allow parol evidence to show the intent of the parties as to the persons covered by the release.[56] Since the majority rule also recognizes that intent may be shown regarding other matters,[57] Mississippi would now apparently allow any intent-related oral testimony by the parties to a release agreement.

II. Commercial Law

The Mississippi Supreme Court handed down six opinions dealing with the Uniform Commercial Code.[58] Although there were no major decisions in this area, certain aspects of this complex body of law were clarified and deserve textual treatment. Cases not mentioned below dealt with the rights of a secured party,[59] disposal of collateral by an accommodation maker,[60] and perfection of a security interest.[61]

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the release, coming under the "and those claiming under them" language of National Cash Register Co. v. Webb, 194 Miss. 626, 629, 11 So. 2d 205, 205 (1942). *Smith*, 474 So. 2d at 1047. The Smith release contained language releasing "all others whatsoever." *Id.* at 1044, 1046. Falke's assertion was based on Burns v. Washington, 251 Miss. 789, 795, 171 So. 2d 322, 324 (1965), where the court permitted a third party who was a stranger to a contract to enforce a promise for his benefit. *Id.* at 1047.

[55] *Smith*, 474 So. 2d at 1047. The court distinguished Burns v. Washington, 251 Miss. 789, 171 So. 2d 322 (1965), as a factual situation where the parties intended to include the third party as a beneficiary, which was not the case in the instant decision. *Smith*, 474 So. 2d at 1047; *see also* Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 347 (1971)(party released only those parties whom he intended to release).

[56] *Smith*, 474 So. 2d at 1046; *see, e.g.*, Knight v. Lowery, 228 Ga. 452, 85 S.E.2d 915, 919 (1971)(parol evidence admitted in Georgia to determine true intent of parties to release); Armstreet v. Greer, 411 S.W.2d 403, 407 (Tex. Civ. App. 1967)(parol evidence admissible in Texas where release was silent as to party's intentions).

[57] *See, e.g.*, Menking v. Larson, 112 Neb. 479, 199 N.W. 823, 824 (1924)(intent shown as to subject matter of release); State Highway Comm'n v. Wilhite, 218 Ind. 177, 31 N.E.2d 281, 282 (1941)(intent shown as to extent of loss or injuries); O'Shea v. New York, C. & St. L. R.R. Co., 105 F. 559, 563 (7th Cir. 1901)(parol evidence allowed to show whether instrument was intended to be covenant not to sue).

[58] Miss. Code Ann. §§ 75-1-101 to -108 (1972).

[59] Dungan v. Dick Moore, Inc., 463 So. 2d 1094, 1098-99 (Miss. 1985)(secured party's substantive right to recover possession was not precluded by defect in process). The *Dungan* opinion contains a good overview of the rights and remedies of the secured party seeking possession of the property in question. *See id.* at 1098-100.

[60] Price v. First Nat'l Bank, 477 So. 2d 1340, 1344 (Miss. 1985)(collateral was disposed of in reasonable, commercial manner).

[61] In Crosby v. Peoples Bank, 472 So. 2d 951 (Miss. 1985), the defendant husband assigned his interest in a promissory note to the plaintiff bank as additional collateral for

A. Impairment of Collateral Defense

The court analyzed the impairment of collateral defense[62] and construed certain Uniform Partnership Law provisions[63] in *Smith & Hitt Construction Co. v. Fowler.*[64] In *Smith & Hitt*, a partnership[65] borrowed money from a bank[66] and executed a note[67] that was secured by a deed of trust on a building owned by one of the partners, Marion T. Smith.[68] The partnership failed to pay the note when due, and Smith & Hitt Construction Company, Inc., a corporation owned solely by Smith, purchased the note from the bank in order to avoid foreclosure.[69] Smith & Hitt executed a note for the purchase price of the partnership note and the bank retained the Smith deed of trust as security for the Smith & Hitt note.[70] Subsequently, Smith & Hitt filed suit on the partnership note against the partners.[71] Since the bank did not as-

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outstanding loans. *Id.* at 952. Subsequently, the defendant husband and the defendant wife executed a separation agreement in contemplation of divorce. *Id.* In the agreement, the husband assigned to his wife the same interest in the promissory note he had assigned to the bank. *Id.* at 952-53. The bank perfected a security interest in the note after the seperation agreement was executed but prior to a final divorce decree. *Id.* at 953. In concluding that the wife had a prior and superior claim to the note, the Mississippi Supreme Court reasoned that, since the separation agreement was a valid contract when executed, and since the wife had possession, then she had a perfected security interest. *Id.* at 956.

[62] MISS. CODE ANN. § 75-3-606 (1972) provides, in pertinent part that "(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a rights of recourse." *Id.*

[63] MISS. CODE ANN. §§ 79-12-59, -61(5), -73 (Supp. 1985).

[64] 466 So. 2d 896 (Miss. 1985).

[65] *Id.* at 897. The members of the partnership were Marion T. Smith, C.H. Fowler, Jr., Dr. R. E. Wiggins, Sr., and R. E. Wiggins, Jr. *Id.*

[66] *Id.* at 898. The partnership obtained a loan of $25,000 from the Peoples Bank of Indianola. *Id.*

[67] *Id.* All partners signed the note as individuals and as partners. At the request of Smith, B.G. Chrestman, Fowler's father-in-law, also signed the note. *Id.*

[68] *Id.* The original note was the subject of several renewals and was secured by various items of collateral. The note that was the subject of this lawsuit was secured by the Smith deed of trust and recording equipment owned by the partnership. *Id.*

[69] *Id.* Smith testified that he had his corporation purchase the partnership note because the bank was threatening foreclosure on the deed of trust on his property. *Id.*

[70] *Id.* Although the bank continued to hold the Smith deed of trust, it assigned to Smith & Hitt the financing statement and security agreement executed by the partnership. *Id.*

[71] *Id.* Smith, of course, was not named as a defendant. Of the remaining partners, the action against Fowler was eventually dismissed, because he was found to be bankrupt. *Id.* at 899. Smith & Hitt also sought recovery against Chrestman as an accommodation party. *Id.* at 898; *see* MISS. CODE ANN. § 75-3-415 (1972)(definition and liability of

sign the Smith deed of trust to Smith & Hitt as security for the partnership note, the partners argued that the collateral was impaired.[72] The Mississippi Supreme Court rejected this contention, stating that the Smith deed of trust was still effective and enforceable as to foreclosure.[73] The court reasoned that once Smith & Hitt paid off the partnership note, it would be entitled to an assignment of the Smith deed of trust.[74]

The court then considered the effect of one partner's bankruptcy on the partnership.[75] The court found that although the bankruptcy served to dissolve the partnership,[76] the partnership would not terminate until the partnership affairs had been "wound up."[77] In order that the partnership affairs be completed in a just manner, the case was remanded to the lower court with appropriate instructions.[78]

The court deemed it unnecessary to decide the various allegations of the defendants regarding impairment of collateral, but instead simply looked to the enforceability of the deed of trust collateral.[79] The court then used this opportunity to clarify and explain the effect of a suit on a partnership note when one partner becomes insolvent.[80]

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accommodation party).

[72] *Smith & Hitt*, 466 So. 2d at 899. When the bank assigned the partnership note, it did not advance any funds but retained the Smith deed of trust as collateral. The partners contended this action constituted impairment of collateral under MISS. CODE ANN. § 75-3-606 (1972); *see supra* note 62.

[73] *Smith & Hitt*, 466 So. 2d at 899. The court stated that the bank was presently secured by Smith & Hitt assets for payment, and that the terms of the Smith deed of trust were broad enough to secure the partnership note. *Id.*

[74] *Id.* The court concluded that the collateral, the Smith deed of trust, was not impaired. *Id.*

[75] *Id.*; *see supra* note 71.

[76] *See* MISS. CODE ANN. § 79-12-61(5)(Supp. 1985)(dissolution is caused by bankruptcy of any partner).

[77] *Smith & Hitt*, 466 So. 2d at 899. The court cited MISS. CODE ANN. § 79-12-59 (Supp. 1985), which provides: "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." *Id.*

[78] *Smith & Hitt*, 466 So. 2d at 899-900; *see* MISS. CODE ANN. § 79-12-73 (Supp. 1985)(remaining solvent partners have right to wind up partnership affairs). The case was remanded to the Chancery Court of Sunflower County in order that the individual partners' liability could be determined, taking into account any previous payments by the partners and the liability of the accommodation party under MISS. CODE ANN. § 75-3-415 (1972).

[79] *Smith & Hitt*, 466 So. 2d at 897.

[80] *Id.* at 899; *see supra* notes 76, 77.

B. *Invalid Check—Liability of a Collecting Bank*

In *White v. Hancock Bank*,[81] the court strictly adhered to the UCC in determining the liability of a collecting bank for an invalid check.[82] Plaintiff Austin White sold his corporation to purchasers who paid by a purportedly certified check.[83] White did not ask his banker to verify the check, but instead endorsed and delivered the check to the bank.[84] When the check was determined to be a forgery, White brought an action against the bank, alleging breach of duties and negligence.[85]

After disposing of the negligence claims,[86] the court reasoned that the provisions of the UCC controlled once White endorsed the check and delivered it to the bank.[87] Analyzed in this manner, the court held

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[81] 477 So. 2d 265 (Miss. 1985).

[82] *Id.* at 273.

[83] *Id.* at 267. The transaction took place at the Hancock Bank on the closing date of the sale. Present at the meeting were the seller White, the purchasers Walter Harvey and Patrick McGlon, White's attorney, and White's banker, Buddy Hutchins. At the meeting, McGlon produced a check for $250,000.00 drawn on, and certified by, a West Indies bank. *Id.*

[84] *Id.* When the check was presented to White, Hutchins requested White to step outside and then asked White his opinion of the check. White stated, "I do not know anything about the check, I am not the banker." Hutchins' reply was to the effect that he saw nothing wrong with the check. As a result, no verification of the check occurred, and the check was subsequently placed in White's savings account. *Id.*

[85] *Id.* at 268. Hancock Bank was the sole defendant since the purchasers could not be located. White charged that the bank was negligent regarding verification and handling of the check, and that the bank was guilty of negligent misrepresentations. The bank denied the complaint and asserted that the rights of the parties should be determined under the UCC. *Id.*

[86] *Id.* at 269-71. White's theory of negligent misrepresentation was dismissed because the court found that the test of Berkline Corp. v. Bank of Mississippi, 453 So. 2d 699, 702 (Miss. 1984), was not met. *White*, 477 So. 2d at 270-71; *see Berkline Corp.*, 453 So. 2d at 702 (plaintiff must prove: "(a)A misrepresentation or omission of a fact; (b)That the representation or omission is material or significant; (c) That in responding to the credit inquiry the bank officer failed to exercise that degree of diligence and expertise the public is entitled to expect of reasonably competent bank officers; (d)That it reasonably relied upon the bank's misrepresentation or omission; and (e) That it suffered damages as a direct and proximate result of such reasonable reliance."); *see also* Shoygo Int'l Corp. v. First Nat'l Bank, 475 So. 2d 425, 427-28 (Miss. 1985)(since bank was engaged to make representation, plaintiff could reasonably rely on statement).

[87] *White*, 477 So. 2d at 271. The court, applying the relevant statutes to White as an indorser, found that White was obligated to pay the instrument upon its dishonor. *See* Miss. Code Ann. § 75-3-414(1)(1972)(unless indorsement specifies otherwise, indorser warrants to pay instrument upon dishonor); Miss. Code Ann. § 75-4-207(2)(b) (1972) (indorser warrants that all signatures are genuine and authorized).

that the risk of fraud loss was on White,[88] and that the bank owed no duty to White for delay or otherwise.[89] In finding for the bank, the court concluded that this was not a case that could be decided on notions of fairness or justice; instead, the court stated that the issues had to be decided under the UCC as enacted by the Mississippi Legislature.[90]

III. Open Account Suit—Evidence

In *Motive Parts Warehouse v. D. & H. Auto Parts Co.*,[91] the plaintiff, in an open account suit, was allowed to show further proof that the account began with a zero balance.[92] The court held that identical figures for the opening balance and the subsequent payment created a rebuttable presumption that the payment was to satisfy the opening balance amount.[93]

Motive Parts Warehouse represents a recognition by the court that the practical nature of an open account requires a greater showing of proof than that mandated by statute.[94] The characteristics of the open account, as delineated in the opinion,[95] dictate that a different

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[88] *White*, 477 So. 2d at 272; *see* Miss. Code Ann. § 75-4-207 (1972)(warranties place risk of fraud loss on fraudulent maker's transferee).

[89] *White*, 477 So. 2d at 272-73. White had argued that the process for collection was unnecessarily delayed. *Id.* at 268, 272. The court simply stated that the check was as worthless on the delivery date as on the date of dishonor. *Id.* at 272. The court also ruled that Hancock Bank's status as a collecting bank did not confer any duties other than those statutorily provided. *Id.*

[90] *Id.* at 273.

[91] 464 So. 2d 1162 (Miss. 1985).

[92] *Id.* at 1166. After the plaintiff Motive Parts Warehouse (MPW) filed its suit, defendant D&H Auto Parts (D&H) filed a counter-affidavit which denied that the account was itemized, and objected to several items. *Id.* at 1163. At trial, D&H successfully prevented the introduction of any evidence to support MPW's claim because the account was not itemized. *Id.*; *see* Miss. Code Ann. § 13-1-141 (Supp. 1984)(unless defendant makes affidavit stating in particular where account is incorrect, plaintiff will receive judgment); Miss. Code Ann. § 11-7-45 (1972)(copy of account must be filed with, or annexed to, complaint).

The court found that since MPW's claim was challenged by D&H's counter-affidavit, MPW could introduce additional proof. *Motive Parts Warehouse*, 464 So. 2d at 1166; *see* Parker v. Thornton, 206 Miss. 662, 667, 40 So. 2d 538, 539 (1949)(plaintiff's testimony allowed because of counter-affidavit specifically demanding proof of purchase of items appearing in account).

[93] *Motive Parts Warehouse*, 464 So. 2d at 1166.

[94] *Id.* at 1166-67.

[95] *Id.* at 1166.

standard is especially required when specific charges on the account are challenged.[96]

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[96] *See supra* note 92.

CRIMINAL LAW

In 1985, the Mississippi Supreme Court rendered numerous decisions relating to criminal law in Mississippi.[1] The most sig-

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[1] The Mississippi Supreme Court decided the following cases in 1985 which are not discussed textually: Cummings v. State, 465 So. 2d 993, 995-96 (Miss.1985)(voluntary intoxication not legally cognizable defense where crime requires proof of specific intent); Friday v. State, 462 So. 2d 336, 338-89 (Miss. 1985)(separate criminal charges may not be consolidated where each charge requires different evidence, and where defendant is subject to two separate sentences; life imprisonment under habitual offender statute is only available where defendant has been previously convicted of two felonies, one violent, and has served at least one year for each previous conviction); Harper v. State, 463 So. 2d 103, 1038-39 (Miss. 1985)(Mississippi's gender-based rape statute not violative of equal protection clause where additional statutes punish rape of males); McBrayer v. State, 467 So. 2d 647, 648-49 (Miss. 1985)(Mississippi's child fondling statute construed not to prohibit initial contact between adult and minor where wholly consensual sexual relations follow and minor not of previously chaste character); West v. State, 463 So. 2d 1048, 1051-52 (Miss. 1985)(evidence of crimes other than one charged is inadmissible if deemed to be unnecessary and prejudicial to accused); Bailey v. State, 463 So. 2d 1059, 1064 (Miss. 1985)(sole remedy for denial of constitutional right to speedy trial is reversal of conviction and dismissal of charges); Jordan v. State, 464 So. 2d 475, 485 (Miss. 1985)(mitigating evidence of defendant's social contributions must be competent and reasonably relevant to question of whether defendant should suffer death or life imprisonment if it is to be admissible in death penalty cases); Kelly v. State, 463 So. 2d 1070, 1073 (Miss. 1985)(murder indictment allows conviction of all lower grade felonious homicides); Ward v. State, 479 So. 2d 713, 715 (Miss. 1985)(indictment which outlines facts demonstrating indifference to human life is preferable); Williams v. State, 463 So. 2d 1078, 1079 (evidence of crime separate and distinct from crime charged is inadmissible for identification of defendant unless absolutely necessary); Williams v. State, 463 So. 2d 1064, 1069 (Miss. 1985)(where facts and circumstances of state's arrangement with confidential informant are revealed to jury, subsequent conviction will not be overturned); Barker v. State, 463 So. 2d 1080, 1082 (Miss. 1985)(where motion for directed verdict is made, court must assume all evidence and all inferences drawn therefrom to be true, and deny the motion if the evidence supports the verdict); Fairley v. State, 467 So. 2d 894, 898-99 (Miss. 1985)(failure to appoint new counsel is not abuse of court's discretion where defendant receives quality representation and motions to withdraw are filed two weeks prior to trial date); Hester v. State, 463 So. 2d 1087, 1093-94 (Miss. 1985)(guilty verdict based upon circumstantial evidence must be supported by proof so conclusive that every other reasonable hypothesis consistent with innocence will be excluded); Lannom v. State, 464 So. 2d 492, 494-95 (Miss. 1985)(totality of circumstances test is employed to determine whether lineup was improperly suggestive); Lee v. State, 469 So. 2d 1225, 1229 (Miss. 1985)(two prosecutions arising out of common occurrence are not violative of double jeopardy clause); Mhoon v. State, 464 So. 2d 77, 82 (Miss. 1985)(six of twelve jurors with law enforcement connections cannot constitute fair and impartial jury); Smith v. State, 463 So. 2d 1102, 1104-05 (Miss. 1985)(judicial record of another

nificant opinions came in the areas of voir dire procedures in

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state is inadmissible unless accompanied by original certificate of authentication or certification by officer in whose office record is kept); Brown v. State, 464 So. 2d 516, 520 (Miss. 1985)(testimony of defendant's apprehension, fear, or anxiety is admissible where defendant's state of mind is crucial element of defense); Edwards v. State, 469 So. 2d 68, 70 (Miss. 1985)(criminal cases require state to prove all objective facts, and not rely on inferences from facts and circumstances); Nobles v. State, 464 So. 2d 1151, 1154 (Miss. 1985)(recklessness or negligence of assault statute is part of act, and not subjective intent of defendant); Smith v. State, 465 So. 2d 999, 1002-03 (Miss. 1985)(juror is not disqualified because of relationship of affinity or consanguinity with potential witness; habitual offender statute is not ex post facto even though previous crimes occurred prior to enactment of statute); Cunningham v. State, 467 So. 2d 902, 906 (Miss. 1985)(in rape cases, prosecutrix's identification of attacker by name through statement to assisting officers is admissible if made spontaneously without indication of manufacturing); Hammond v. State, 465 So. 2d 1031, 1034 (Miss. 1985)(trial court has discretion to determine whether event prior to crime charged is too remote to be admissible); Hanner v. State, 465 So. 2d 306, 308-10 (Miss. 1985)(suppression hearing to suppress identification testimony may be held in front of jury; defendant has no *per se* right to counsel at post-indictment lineup; warrantless arrest is permissible where it is clear that felony has occurred, and arresting officer has reasonable grounds to believe arrestee committed felony); Sand v. State, 467 So. 2d 907, 909-10 (Miss. 1985)(overnight recess by jury is not reversible error where there was no timely objection and no showing of prejudice); Thompson v. State, 468 So. 2d 852, 854 (Miss. 1985)(court-initiated questions are likely to infer court's approval of witness or testimony, and are prohibited because of their prejudicial effect); Watson v. State, 465 So. 2d 1025, 1030 (Miss. 1985)(conflict of evidence is to be decided by jury; failure of prosecution to subpoena witness is not reversible error if defense had knowledge of, and could have subpoened the witnesses); Belino v. State, 465 So. 2d 1043, 1043-45 (Miss. 1985)(in determining whether verdict is against overwhelming evidence, all evidence must be reviewed in light most favorable to the state without regard to evidence favorable to defendant; if evidence is sufficient to support verdict of guilty beyond reasonable doubt, peremptory instruction must be refused); Harden v. State, 465 So. 2d 321, 222-23 (Miss. 1985)(indictment must reasonably notify defendant of all charges; lewd suggestions and physical acts of aggression are sufficient to sustain indictment for attempted rape); Logan v. State, 465 So. 2d 339, 340 (Miss. 1985)(juror's failure to respond properly to voir dire is not grounds for new trial unless prejudicial to defendant); Weeks v. State, 465 So. 2d 334, 335-36 (Miss. 1985)(evidence of separate and distinct crimes is admissible to prove identity, guilty knowledge, intent, or motive; evidence of separate and distinct crime is admissible if so interwoven with crime charged that separation is impossible); Wiley v. State, 465 So. 2d 318, 320 (Miss. 1985)(trial court's findings on admissibility of contested confession are conclusive unless contrary to overwhelming weight of evidence); Cook v. State, 467 So. 2d 203, 209-10 (Miss. 1985)(where state lacks evidence that defendant provoked incident or was aggressor, defendant is entitled to jury instruction that he could stand his ground without losing right of self-defense); McDonall v. State, 465 So. 2d 1077, 1078 (prisoner's post-conviction collateral relief must be filed in original trial court unless conviction and sentence were previously appealed to Mississippi Supreme Court); Robinson v. State, 465 So. 2d 1065, 1068-69 (Miss. 1985)(co-indictee's guilty plea in separate criminal trial is admissible in other indictee's trial if defense fails to object, and testimony does not indi-

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cate that they were involved together with crime); Toncrey v. State, 465 So. 2d 1070, 1071 (Miss. 1985)(evidence that defendant had stolen property after robbery is admissible as circumstance in case tried on circumstantial evidence); Allen v. State, 465 So. 2d 1088, 1090-91 (Miss. 1985)(where defendant revokes plea bargaining, subsequent conviction is valid and defendant has neither constitutional right to enforce plea bargaining nor contractual right to enforce plea bargain because revocation nullifies any detrimental reliance); Dixon v. State, 465 So. 2d 1092, 1096 (Miss. 1985)(multi-count indictment was proper where crimes contain same elements and arose from same occurrence); Edwards v. State, 465 So. 2d 1085, 1086 (Miss. 1985)(defendant's affirmative acts in reliance on plea bargaining agreement require state to comply with agreement); Gerlach v. State, 466 So. 2d 75, 78-79 (Miss. 1985)(jury's verdict of insanity is conclusive and unreviewable; attack on particular juror's presence on jury requires timely objection made on record; hypothetical questions to expert witness may include only those facts which will elicit relevant opinion); Goss v. State, 465 So. 2d 1079, 1080 (Miss. 1985)(Mississippi's rape shield statute excludes evidence of specific instances of sexual conduct of prosecutrix unless relevant and admissible in interest of justice); Wallace v. State, 466 So. 2d 900, 905 (Miss. 1985)(cross-examination of co-indictee as to his guilty plea to lesser charge is admissible for purposes of impeachment or attacking credibility of witness); Watson v. State, 465 So. 2d 1091, 1092 (Miss. 1985)(photostatic copy of document is admissible in place of original document upon presenting party's showing that copy is correct, and explaining absence of original); Stewart v. State, 466 So. 2d 906, 908 (Miss. 1985)(evidence of previous crimes is generally inadmissible due to prejudicial impact upon jury); Womble v. State, 466 So. 2d 910, 912 (Miss. 1985)(defendant who pleads guilty to attempted armed robbery has no constitutional rights to complete parole information); Acevedo v. State, 467 So. 2d 220, 223-24 (Miss. 1985)(where expert's report was presented to opposition at pretrial discovery, expert may not contradict report at trial; where prosecutorial misconduct is blatant and prejudicial, trial judge should dismiss jury and take measures to compel proper conduct of counsel); In re Alvin Hill, 467 So. 2d 669, 670-71 (Miss. 1985)(where questions of fact and law have been previously litigated and conviction returned, defendant may not relitigate through writ of error coram nobis even though plead through federal constitutional claim); Bennett v. State, 468 So. 2d 855, 856 (Miss. 1985)(whether minor is "physically helpless person" within sexual battery statute is question for jury); Fuselier v. State, 468 So. 2d 45, 50-51 (Miss. 1985)(where witness admits and testifies to content of prior inconsistent statement, written statements are inadmissible; evidence of threatened prosecution or lenient treatment by police officials is admissible to show bias or prejudice where credibility of witness is essential to determination of guilt; member of victim's family is barred from sitting inside rail at trial due to potential bias or prejudice; state's inexcusable refusal to comply with discovery is reversible error); Burnham v. State, 467 So. 2d 946, 947-48 (Miss. 1985)(person is guilty of constructive presence of narcotics only if he is aware of presence and character of substance, and is intentionally and consciously in possession); Gillum v. State, 468 So. 2d 856, 860, 862-63 (Miss. 1985)(weekend home is dwelling home for purposes of burglary if owner intends that it serve as dwelling house and returns periodically; decision based upon prior convictions and pre-sentencing report is left undisturbed unless patently biased; burden of proof is distinguished and defined only in voir dire or closing arguments); Lacy v. State, 468 So. 2d 63, 64-65 (Miss. 1985)(good time credit computed from conviction through resolution of appeal shall accrue to all felonies finalized and affirmed

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by Mississippi Supreme Court); McCommon v. State, 467 So. 2d 940, 942 (Miss. 1985)(search warrant must be issued by neutral and detached magistrate based upon totality of circumstances); Cabello v. State, 471 So. 2d 332, 339-40 (Miss. 1985)(hearsay is admissible where no prejudice will result from admission; parent-child privilege is construed narrowly and must be mutually assented to; agreement between state and witness is admissible to attack witness's credibility; where witness who is not named in discovery intends to testify, defense afforded opportunity to interview witness and seek continuance if unduly prejudiced); Course v. State, 469 So. 2d 80, 82 (Miss. 1985)(where owner of home resides in nursing home for extended period, home is still dwelling house if owner intends to return; evidence viewed in favor of state is sufficient to prove intent if reasonable inferences indicate such); Fuller v. State, 468 So. 2d 68, 71-72 (Miss. 1985)(where defendant or defendant's witnesses are witnesses to homicide, their testimony as to this event must be accepted, if reasonable, unless state substantially contradicts credibility of such witnesses; only trial judge may excuse juror); Johnson v. State, 477 So. 2d 196, 206-222 (Miss. 1985)(jury determines weight to be given account of eyewitness who submits contradictory statements; counsel's agreement to refrain from objecting until closing argument precludes any appellate review of previous objection; previous sentence imposed on co-defendant in separate trial is not admissible as mitigating circumstance in subsequent prosecution; court is not required to instruct jury that it may impose life sentence rather than death sentence, especially where aggravating circumstances outweigh mitigating factors); McGrew v. State, 468 So. 2d 95, 96-97 (Miss. 1985)(adequate evidence of culpable negligence is sufficient to prevent directed verdict in manslaughter case); Smith v. State, 477 So. 2d 191, 195-96 (Miss. 1985)(indictment need not include habitual offender section number if it sufficiently notifies defendant that he will be charged as habitual offender, and that state seeks life sentence); Ellis v. State, 469 So. 2d 1256, 1259-60 (Miss. 1985)(valuation of property in larceny cases is equal to price of property in open market; objection based on variance between indictment and proof offered must be raised at trial court); Gallion v. State, 469 So. 2d 1247, 1249 (Miss. 1985)(defendant may not be examined about prior convictions; evidence of specific conduct by defendant not resulting in conviction is inadmissible for purposes of impeachment); Gray v. State, 469 So. 2d 1252, 1254-55 (Miss. 1985)(prosecuting attorney is disqualified where he previously represented or consulted professionally with accused; rule is proscriptive and not retroactive); Plummer v. State, 472 So. 2d 358, 361 (Miss. 1985)(before continuance should be granted, evidence must prove that defendant would have been better prepared or that lawyer could have better served him); Clemons v. State, 470 So. 2d 653, 655 (Miss. 1985)(state must present evidence of intent in attempted rape charge; attorney must testify to observations of defendant which occurred prior to creation of attorney-client relationship); Hughes v. State, 470 So. 2d 1046, 1047-48 (Miss. 1985)(extraneous matters or criminal offenses not included in indictment are inadmissible as evidence); Lancaster v. State, 472 So. 2d 363, 365-66 (Miss. 1985)(trial court is not in error for failing to grant unrequested instruction; evidence of previous crimes is admissible to prove motive); Barnes v. State, 471 So. 2d 1218, 1221 (Miss. 1985)(Rule 4.06 of Uniform Rules of Circuit Court Practice requires that copies of inconsistent statements by witness be given to defense counsel prior to cross examination); Breckenridge v. State, 472 So. 2d 373, 376 (Miss. 1985)(search warrant is correctly issued based upon totality of circumstances if it indicates fair probability that contraband or evidence of crime will be found in that place; disclosure of identity of informant is within

structions, and the right to effective counsel.

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trial judge's discretion where informant is not material witness to guilt or innocence of accused); Burge v. State, 472 So. 2d 392, 395-96 (Miss. 1985)(refusal to grant new trial is undisturbed where jury is properly instructed on all defenses and returns verdict of manslaughter by culpable negligence); Davis v. State, 477 So. 2d 223, 224 (Miss. 1985)(where accused is previously convicted of three non-violent felonies, life sentence as habitual offender is improper); Davis v. State, 472 So. 2d 428, 432 (Miss. 1985)(evidence of substance of conversations between third party and defendant's spouse is inadmissible; evidence that such conversation occurred is admissible); Donald v. State, 472 So. 2d 370, 372 (Miss. 1985)(proof of other crimes is generally inadmissible but may be used to show identity); Hickson v. State, 472 So. 2d 379, 380-82 (Miss. 1985)(reversible error to allow anatomical parts to be used as demonstrative evidence where gruesome nature may provoke undue prejudice, and where such use has no probative value; where accused is on trial for life or liberty, he may be handcuffed only for reason of clear and present danger to order or security); Hines v. State, 472 So. 2d 386, 390 (Miss. 1985)(indictment must contain plain and concise statement notifying accused of the offense charged; indictment charging "unlawful, willful and felonious" sexual penetration of identified victim at a specified time and place is sufficient to charge accused with sexual battery); Riddles v. State, 471 So. 2d 1234, 1236 (Miss. 1985)(where constitutionality of arrest is challenged, trial court must determine whether facts available to arresting officer at time would reasonably lead him to conclude that arrest was warranted); Thomas v. State, 472 So. 2d 425, 427-28 (Miss. 1985)(trial court has discretion to deny motion for withdrawal of guilty plea); Tobias v. State, 472 So. 2d 398, 399-400 (Miss. 1985)(in-court identification is proper where witness identified accused with certainty at pre-trial lineup, and where witness testified that identification was based on observations made at scene of crime); Pace v. State, 473 So. 2d 167, 170-71 (Miss. 1985)(judge's inquiry of jury regarding how many voted for conviction and for acquittal is not coercive unless judge attempts to force verdict by his comments); Rainer v. State, 473 So. 2d 172, 173-74 (Miss. 1985)(court will set aside jury conviction if evidence could not have supported reasonable juror's conclusion of guilt beyond reasonable doubt); Saik v. State *ex rel.* Miss. Bureau of Narcotics, 473 So. 2d 188, 191 (Miss. 1985)(use of vehicle by another at time of offense, without record owner's knowledge, does not prove case for forfeiture); Swanier v. State, 473 So. 2d 180, 185-86 (Miss. 1985)(photographs of murder victim which are probative of severity of wounds are admissible even though gruesome; voluntary confession may be admissible even if arrest was illegal; jury instruction allowing alternate verdict of manslaughter is not required if no evidence is introduced that would sustain such verdict); Burgess v. State, 473 So. 2d 432, 434 (Miss. 1985)(to determine whether due process rights of speedy trial have been violated, court will consider length and reason for delay, defendant's assertion of right to speedy trial, and prejudice to defendant); Carter v. State, 473 So. 2d 471, 475, 476 (Miss. 1985)(denying continuance which results in injustice to defendant is grounds for reversal; test in *Brown v. Illinois* is used to determine if initial arrest was illegal; confession may be admissible even where arrest was illegal); Flanagin v. State, 473 So. 2d 482, 484-86 (Miss. 1985)(admission of recollection testimony violates best evidence rule where non-production of writings is unexplained; recollection testimony is not admissible if prejudicially cumulative and independently damaging; where no direct evidence offered supporting prosecution, instruction that state must prove that guilt to exclusion of every other reasonable hypothesis is mandatory); Hardy v. State, 473 So. 2d 941, 941-42 (Miss. 1985)(habitual criminals are

I. Adherence to Strict Voir Dire Procedures in Death Penalty Cases

An accused criminal defendant's right to be tried by a jury of his or her peers is a fundamental right secured by the Constitutions of the United States and Mississippi.[2] The role of the

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not allowed administrative earned time to reduce sentence); Hussey v. State, 473 So. 2d 478, 480 (Miss. 1985)(jury should be given precautionary instruction about believing accomplice's testimony if testimony was basis for conviction); Walker v. State, 473 So. 2d 435, 438-39 (Miss. 1985)(affiant is not required to prove credibility of eyewitness for probable cause determination for issuance of search warrant); Winters v. State, 473 So. 2d 452, 458 (Miss. 1985)(both recording of conversation and testimony by witnesses who heard it are considered "best evidence"); Clemons v. State, 473 So. 2d 943, 944-45 (Miss. 1985)(court may reverse conviction for murder because of contradictory testimony and remand for sentencing on manslaughter when guilt of that crime has been established beyond reasonable doubt); Duckworth v. State, 477 So. 2d 935, 937-38 (Miss. 1985)(trial judge has discretion of granting or refusing severance of defendants in cases not involving death penalty; jury should determine if instrument is deadly weapon; jury instructions should not contain comments on specific evidence); Gavin v. State, 473 So. 2d 952, 954, 956 (Miss. 1985)(before exculpatory statement can be entered into evidence, state must prove that *Miranda* warnings were given and defendant waived his rights intelligently, knowingly, and voluntarily; to peremptorily instruct jury to find defendant not guilty, trial judge must consider evidence in light most favorable to state); Holmes v. State, 475 So. 2d 434, 435 (Miss. 1985)(absence of real evidence on appeal because of loss or theft is not grounds for reversal); McQueen v. State, 473 So. 2d 971, 973 (Miss. 1985)(phrase "crime of violence" is not unconstitutionally vague); Miller v. State, 473 So. 2d 945, 947 (Miss. 1985)(rebuttal testimony is improper when rebuttal actually rebuts nothing; testimony by witness containing hearsay statements denied defendant constitutional right to confrontation); Presley v. State, 474 So. 2d 612, 620 (Miss. 1985)(in some cases, trial court must consider all aspects of defendant's background and look for mitigating circumstances in order that just sentences be imposed); Robinson v. State, 473 So. 2d 957, 960-61 (Miss. 1985)(reliable in-court identification of defendant by victim is both admissible and sufficient to support conviction, notwithstanding suggestive confrontation at preliminary hearing and denial of evidentiary hearing on defendant's motion to suppress); Schilling v. State, 473 So. 2d 975, 976 (Miss. 1985)(county officers who defraud state or any county of any monies shall be guilty of embezzlement); Stringer v. State, 477 So. 2d 1335, 1337-38 (Miss. 1985)(interest, bias, or prejudice of witness may be shown to measure his credibility; testimony is admissible to show state of mind of witness and what he believed); Thomas v. State, 474 So. 2d 604, 605 (Miss. 1985)("pyramiding" of multiple punishments growing out of same set of operative facts constitutes reversible error); Jordan v. State, 474 So. 2d 622, 632 (Miss. 1985)(conviction and sentence affirmed under authority of Morea v. State, 329 So. 2d 527 (Miss. 1976)); Hudson v. State, 475 So. 2d 156, 157-58 (Miss. 1985)(state may seize and introduce evidence obtained during search without warrant if one with whom defendant shares residence voluntarily consents to search of shared premises); Johnson v. State, 475 So. 2d 1136, 1138-39 (Miss. 1985)(indictment need not include technical and formal words if it is clear and concise statement which sufficiently notifies defendant of crime charged); Willis v. State, 475 So. 2d 163, 163-64 (Miss. 1985)(court affirmed murder conviction; opinion merely

jury becomes even more important where the state seeks to im-

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incorporated portions of prior opinions); Parrott v. State, 475 So. 2d 167, 167 (Miss. 1985)(conviction of attempted robbery and sentence of forty years imprisonment affirmed); Smith v. State, 477 So. 2d 259, 260 (Miss. 1985)(appellant had no claim for contending that sentences should run concurrently rather than consecutively where appellant was advised by counsel, and where records of court indicated that terms were to run consecutively); Tokman v. State, 475 So. 2d 457, 457 (Miss. 1985)(petitioner granted leave for evidentiary hearing on issues which court could not resolve on face of record); Darby v. State, 476 So. 2d 1192, 1193-94 (Miss. 1985)(unless delay in defendant's trial violates test in Baker v. Wingo, 407 U.S. 514 (1972), there is no violation of right to speedy trial); Davis v. State, 476 So. 2d 608, 609-10 (Miss. 1985)(evidence of other crimes is admissible where such crimes are so interwoven with crime charged as to constitute one transaction); Henry v. State, 484 So. 2d 1012, 1013-15 (Miss. 1986)(failure to release discoverable evidence to defendant, combined with subsequent admission into evidence constitutes reversible error; person should be allowed to testify as expert if person possesses knowledge which layman is not likely to possess); Johnson v. State, 476 So. 2d 1195, 1209-11 (Miss. 1985)(change of venue should be granted upon showing that impaneling of impartial jury is doubtful, and such doubt is implicit when public opinion is saturated with bias against defendant); Harbin v. State, 478 So. 2d 796, 799-800 (Miss. 1985)(indictment is legally sufficient if accused is given notice of crime with which he has been charged; jury need not be instructed on lesser charge if uncontradicted facts support greater charge so conclusively that no reasonable juror could find accused guilty of lesser charge); Keys v. State, 478 So. 2d 266, 267-68 (Miss. 1985)(constructive possession of marijuana alone is sufficient evidence to relieve trial judge of his duty to instruct jury with circumstantial evidence instruction); Melton & Pettway v. State, 477 So. 2d 942, 943 (Miss. 1985)(house under construction which has never been lived in is not dwelling within statute defining burglary); Strickland v. State, 477 So. 2d 1347, 1348-49 (Miss. 1985)(conducting pretrial examination of jurors outside presence of defendant or his counsel is reversible error by trial court); Tigner v. State, 478 So. 2d 293, 294-95 (Miss. 1985)(defendant's evidence need not be accepted as true despite absence of witnesses other than those offered by defense); Van v. State, 477 So. 2d 1350, 1351 (Miss. 1985)(instructions that assume material facts to be true are erroneous and invade province of jury); Clemons v. State, 477 So. 2d 943, 943 (Miss. 1985)(assignments of error raise no issue requiring discussion); Davidson v. State, 477 So. 2d 944, 944 (Miss. 1985)(circuit court may dismiss petition for writ of habeas corpus without evidentiary hearing); Haymond v. State, 478 So. 2d 297, 298-99 (Miss. 1985)(actions of automobile guest constitute kidnapping when guest forcibly takes control of automobile against driver's wishes and driver becomes prisoner in his own automobile); Fisher v. State, 481 So. 2d 203, 215-223 (Miss. 1985)(change of venue should be granted where defendant's right to fair trial may be lost); Washington v. State, 478 So. 2d 1028, 1030-31 (Miss. 1985)(habitual offender statute does not contravene constitutional provisions providing for separation of powers in respective branches of government); Barnette v. State, 478 So. 2d 800, 802 (Miss. 1985)(state's prosecution of separate, independent crimes arising from common nucleus of operative facts did not constitute double jeopardy); Billiot v. State, 478 So. 2d 1043, 1045 (Miss. 1985)(execution may not be stayed under theory of supervening present insanity where accused does not establish that he is presently insane, and this insanity developed since his trial and sentence of death); Cunningham v. State, 478 So. 2d 308, 310 (Miss. 1985)(where two statutes can be applied in case, courts should apply

pose the death penalty. In such cases, voir dire proceedings be-

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statute which imposes least punishment); Quinn v. State, 479 So. 2d 706, 708 (Miss. 1985)(evidence of prior criminal activity that has not resulted in conviction is admissible for impeachment in cross-examination); Ward v. State, 479 So. 2d 713, 715 (Miss. 1985)(indictment for aggravated assault should set forth factual situation which manifests indifference to human life; specific facts need not be alleged); Wilcher v. State, 479 So. 2d 710, 712-13 (Miss. 1985)(appellant failed to show that attorneys were not functioning as effective counsel); Winston v. State, 479 So. 2d 1093, 1094-95 (Miss. 1985)(indictment for burglary need not state specific item of personal property that accused is charged with intending to steal); Buckhalter v. State, 480 So. 2d 1128, 1128-29 (Miss. 1985)(error as to pleadings, procedure, or misdirection of jury shall not reverse judgment unless judgment has resulted in miscarriage of justice); Griffin v. State, 480 So. 2d 1124, 1127 (Miss. 1985)(concert of free will, which is required to show conspiracy, can be shown by acts of parties and circumstances, as well as by agreement of conspirators); Miskelley v. State, 480 So. 2d 1104, 1112 (Miss. 1985)(where admission or confession is given to third party, wide latitude should be given to defendant in cross-examination to determine third party's interest, bias, motive, hostility, and credibility); Sanders v. State, 479 So. 2d 1097, 1105-08 (Miss. 1985)(instructing jury on offense of possession of controlled substance with intent to sell was erroneous where indictment charged defendant only with sale of cocaine); Tyler v. State, 478 So. 2d 315, 317 (Miss. 1985)(directed verdict is proper when irreconcilable conflict in evidence is created so that no rational jury could find for state); Nations v. State, 481 So. 2d 760, 761 (Miss. 1985)(defendant must be tried within 270 days of his arraignment unless good cause for delay is shown); In re W.R.A., a minor, 481 So. 2d 280, 285-86 (Miss. 1985)(minor's confession is admissible if prosecution establishes that confession was freely and voluntarily given); Pinkton v. State, 481 So. 2d 306, 309-10 (Miss. 1985)(capital murder statute, which requires written finding by jury relating to defendant's actions and intent, applies to sentencing phase of bifurcated trial, even where defendant pled guilty in first phase); Ward v. State, 480 So. 2d 524, 524 (Miss. 1985)(appeals to Mississippi Supreme Court must be perfected within thirty days); Barnette v. State, 481 So. 2d 788, 789-91 (Miss. 1985)(evidence of separate crime generally inadmissible unless crimes are so connected as to constitute single transaction; certificate of analysis is admissible without in-court testimony of analyst only if defendant agrees to admission at pre-trial, but defendant may still object, thereby requiring analyst to testify); Campbell v. State, 480 So. 2d 1161, 1162 (Miss. 1985)(jury is sole judge of credibility of witnesses and of weight and worth of testimony); Dedeaux v. State, 480 So. 2d 532, 532 (Miss. 1985)(conviction affirmed; court merely cited prior decisions); Holmes v. State, 481 So. 2d 319, 322 (Miss. 1985)(where alibi is used as defense, judge should instruct jury concerning alibi and allow members of the jury to decide weight and credibility of evidence; if accomplice's testimony is uncorroborated, judge should grant cautionary instruction); Jones v. State, 481 So. 2d 798, 799-800 (Miss. 1985)(probable cause for search warrant can be supported by information received from confidential informant of known reliability); Luvene v. State, 481 So. 2d 323, 325-26 (Miss. 1985)(admissibility of photographs rests within sound discretion of trial judge; to contend verdict is contrary to overwhelming weight of evidence, issue must have been presented to trial court in motion for new trial or JNOV); Mack v. State, 481 So. 2d 793, 794-95 (Miss. 1985)(admission constitutes direct evidence of crime; circumstantial jury instruction is not required); Ross v. State, 480 So. 2d 1157, 1159-61 (Miss. 1985)(where defendant is retried and sentenced to greater penalty, judge must include in sentence

come more significant because they must ensure that the criminal defendant is afforded trial by an impartial jury of his peers.[3]

In 1985, the Mississippi Supreme Court was asked to decide whether errors by the trial judge during voir dire proceedings in a capital case required reversal and a new trial in *Gray v. State*.[4] David Randolph Gray was indicted and tried on capital murder charges arising from a kidnapping and homicide.[5] During voir dire proceedings prior to trial, a number of prospective jurors "expressed the sentiment that they had conscientious scruples

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reasons why harsher sentence was imposed; reasons must be based on conduct by defendant which occurred after original sentencing proceeding); Ruffin v. State, 481 So. 2d 312, 315 (Miss. 1985)(indigent defendant not provided with transcript where defendant's reason for obtaining transcript bears no indication that transcript would be useful); Tedford v. State, 480 So. 2d 531, 531 (Miss. 1985)(no issues required discussion); West v. State, 485 So. 2d 681, 687-88 (Miss. 1985)(defendant's constitutional right not to testify shall not operate to prejudice him, and shall not be commented upon by counsel); Banks v. State, 481 So. 2d 844, 845-46 (Miss. 1985)(evidence seized in valid post-arrest search not suppressed, even though defendant was not advised of *Miranda* rights, where defendant answered no questions or made no confession); Gray v. State, 481 So. 2d 763, 764 (Miss. 1985)(delay in trial will not violate constitutional rights if delay was justified upon good cause); Isom v. State, 481 So. 2d 820, 822-23 (Miss. 1985)(supplemental or special interrogatory by court to assist deadlocked jury must be uncoercive and free from suggestive effect); James v. State, 481 So. 2d 805, 811 (Miss. 1985)(instruction which allows jury to convict upon finding that defendant conspired only with informant is erroneous); Lewis v. State, 481 So. 2d 842, 843-44 (Miss. 1985)(proceedings for forfeiture of property seized under Uniform Controlled Substance Law shall be instituted promptly); Weaver v. State, 481 So. 2d 832, 835-36 (Miss. 1985)(where prejudicial evidence is admitted which has no relevancy, conviction will be reversed); Williams v. State, 481 So. 2d 839, 841 (Miss. 1985)(judgment shall not be reversed unless record clearly indicates that judgment resulted in miscarriage of justice); Caldwell v. State, 481 So.2d 850, 851 (Miss. 1985)(absent proof of purposeful use of peremptory challenges to exclude black persons from juries, such claims are not viable); Clemons v. State, 482 So. 2d 1102, 1105-06 (Miss. 1985)(one is not guilty as accessory before fact by mere presence at time another suggests possibility of future criminal conduct); Dufour v. State, 483 So. 2d 307, 308 (Miss. 1985)(Mississippi Uniform Post-Conviction Collateral Relief Act applied to defendant although it was not in effect at trial).

[2] *See* U.S. CONST. amend.VI. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." *Id.* Mississippi provides a similar right in Article III, § 26 of the state constitution. *See* MISS. CONST. art. III, § 26 (guaranteeing accused criminal defendant right to trial by impartial jury).

[3] *See* Witt v. Wainwright, 105 S. Ct. 844, 849-53 (1985)(discussing importance of jury in cases involving death penalty).

[4] 472 So. 2d 409 (Miss. 1985), *cert. granted*, 106 S. Ct. 1182 (1986).

[5] *Gray*, 472 So. 2d at 411.

against the death penalty and could not vote to inflict such a penalty under any circumstances."[6] Normally, such jurors could be excused only for cause,[7] but the trial judge concluded that these jurors were merely claiming reservations in order to be released from jury service. Accordingly, the trial judge refused to excuse them for cause.[8] As a result, the state was required to exercise peremptory challenges in order to dismiss these prospective jurors.[9] However, as the voir dire proceedings continued, one prospective juror gave conflicting statements as to whether she could inflict the death penalty even if the evidence and testimony warranted such a decision.[10] Because of the juror's equivocation, the state sought to excuse her and complained that the trial court had erroneously forced it to use all of its peremptory challenges.[11] Thereafter, the trial judge agreed to dismiss the juror from the panel.[12] A jury was ultimately selected and Gray was convicted and sentenced to death.[13]

On appeal, Gray argued that the trial judge's decision to dismiss the juror for cause was error because it effectively denied him his constitutionally protected right to be tried by an impartial jury of his peers.[14] The Mississippi Supreme Court, speaking through Justice Dan Lee,[15] recognized that the right of an accused criminal defendant to be tried by an impartial jury was "the foundation of fairness and the hallmark of our judicial

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[6] *Id.*

[7] *See* Witherspoon v. Illinois, 391 U.S. 510, 518-23 (1968)(allowing excusal of jurors from capital punishment cases where such jurors have conscientious scruples against capital punishment).

[8] *Gray*, 472 So. 2d at 421.

[9] *Id.*

[10] *Id.* at 422. The juror positively stated several times that she could return the death penalty, but other responses were equivocal. *Id.*

[11] *Id.*

[12] *Id.* The trial judge agreed with the prosecution and agreed to dismiss the juror for cause in an effort to correct the erroneous ruling which forced the state to exercise its peremptory challenges. *Id.*

[13] *Id.* at 411.

[14] *Id.* at 422. Gray argued that the trial court erred in giving the state an additional challenge for cause since all challenges for cause had been previously exercised, and as such, the empaneling of the jury had violated his constitutionally protected rights to a fair and impartial jury. *Id.*

[15] *Id.* at 411. Gray assigned an additional 11 errors on this appeal but each was denied by the court in an opinion by Justice Michael Sullivan. *Id.*

system."[16] The court stated that the role of the jury became even more significant where the accused criminal defendant faced death as a potential punishment for the crime.[17] In such cases, the United States Supreme Court has mandated that all trial courts follow unique voir dire proceedings to ensure that the criminal defendant receives a trial before an impartial jury.[18]

Justice Lee noted that Mississippi had attempted to adopt such proceedings in *Armstrong v. State*.[19] Under *Armstrong*, the trial judge was required to inform the veniremen that they had been summoned to serve in a capital case where a verdict of guilty could possibly result in the infliction of the death penalty.[20] Thereafter, the trial judge should seek to determine whether any of the prospective jurors had "conscientious scruples against inflicting the death penalty" where the testimony and evidence might warrant such a penalty.[21] If any of the veniremen answered affirmatively, then the judge should ask each of these potential jurors whether they could, regardless of their personal objections, "follow the testimony and instructions of the court and return a verdict of guilty" even though it may result in a death penalty. Those potential jurors who could not faithfully perform their duties as set forth by the court were to be dismissed, and those who could perform their duties were to be retained for potential jury service.[22] However, the *Gray* court stated that the ultimate issue to be resolved through this procedure was whether the prospective juror could faithfully follow the instructions of the trial court and the juror's oath.[23]

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[16] *Id.* at 420; *see also supra* note 2 (discussing constitutional right of criminal defendant to be tried before impartial jury of his peers).

[17] *Gray*, 427 So. 2d at 421.

[18] *See* Witt v. Wainwright, 105 S. Ct. 844, 846-47 (1985)(reaffirming and modifying holding in *Witherspoon*); Witherspoon v. Illinois, 391 U.S. 510, 522-23 (1968)(recognizing that jurors in capital cases may be excluded where they express conscientious scruples against inflicting death penalty).

[19] 214 So. 2d 589 (Miss. 1968).

[20] *Id.* at 593.

[21] *Id.*

[22] *Id.*

[23] *Gray*, 427 So. 2d at 421. Justice Lee recognized that the decision in *Witherspoon* had been refined in Adams v. Texas, 488 U.S. 38 (1980). In *Adams* the United States Supreme Court stated that the purpose of these special voir dire proceedings was to determine whether the prospective jurors could perform their duties and return a sen-

In the instant case, a majority of the court noted that the trial judge failed to follow the procedure outlined in *Armstrong*.[24] Instead, the prosecuting attorneys conducted the death penalty voir dire.[25] Additionally, the trial court had refused to excuse prospective jurors for cause even though they had expressed conscientious scruples against imposing the death penalty, thus forcing the state to use all of its peremptory challenges before the juror in question was voir dired.[26] However, the supreme court noted that the trial court recognized its error and simply attempted to rectify the situation by dismissing the juror in question.[27] The court stated that although such a procedure was highly disfavored, it did not constitute reversible error unless the criminal defendant was prejudiced by the trial court's ruling.[28] No such prejudice resulted in this case.[29] Further, the court recognized that the state was entitled to a jury that could follow the instructions and the juror's oath, and that the trial court should be afforded an opportunity to correct any errors, especially where there could have been no possible prejudice to the defendant.[30] Accordingly, a majority of the Mississippi Supreme Court affirmed the lower court's decision.[31]

In a dissent, Justice Sullivan argued that the juror in question was "clearly qualified to be seated" on the jury, and to dismiss her for cause was error.[32] Furthermore, Justice Sullivan

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tence of death where warranted in accordance with jury instructions and the juror's oath. *Adams*, 448 U.S. at 45. *Adams* was subsequently affirmed, and *Witherspoon* was modified to reflect this decision by the United States Supreme Court in Witt v. Wainwright, 105 S. Ct. 844 (1985).

[24] *Gray*, 427 So. 2d at 421.

[25] *Id.* at 422.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 423. The majority recognized that trial courts were often afforded opportunities to correct errors by way of motions for a new trial. Here, considering notions of judicial economy and the fact that no prejudice resulted to the defendant, the court found no merit in Gray's assignment of error. *Id.*

[31] *Id.*

[32] *Id.* at 424 (Sullivan, J., dissenting). Justice Sullivan was joined in his dissent by Justice Robertson and Chief Justice Patterson. Justice Sullivan argued that the juror qualified under the recent *Adams* decision because she affirmatively stated that she could impose the death penalty and would abide by her juror's oath. As such, the trial

noted that the majority attempted to justify the decision as an effort by the trial court to rectify previous errors, and that the removal of the juror was simply a harmless error because it gave back to the state a previously exercised peremptory challenge.[33] Citing *Davis v. Georgia*,[34] Justice Sullivan pointed out that the dismissals for cause in capital murder cases could not be characterized as harmless errors regardless of whether the state could have peremptorily challenged the juror at trial.[35] Furthermore, any deviation from the standards set by the United States Supreme Court in death penalty voir dire proceedings required reversal and the granting of a new trial.[36] Accordingly, Justice Sullivan argued that the majority opinion clearly contravened existing precedent, and that the conviction required immediate reversal and a new trial.[37]

The decision in *Gray* reflects the willingness of the Mississippi Supreme Court to afford trial courts an opportunity to correct any previous errors. However, the very nature of the case, a capital murder trial, mandates that the court adhere to the strict standards set out by the United States Supreme Court in order to ensure that the criminal defendant is afforded a fair trial.[38] The rights of criminal defendants should not be sacrificed simply as a means of affording trial courts the opportunity to correct previous errors. Even where no express prejudice results to the criminal defendant, there is inherent prejudice because the court has deviated from the unique procedures mandated in capital punishment cases. Furthermore, the majority opinion ignores existing case law which requires strict adherence to death

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judge's decision to excuse her for cause was in error. *Id.* at 425.

[33] *Id.* at 424.

[34] 429 U.S. 122 (1976).

[35] *Gray*, 427 So. 2d at 425 (Sullivan, J., dissenting); *see also* Burns v. Steller, 592 F.2d 1297, 1300-01 (5th Cir. 1979), *adhered en banc*, 626 F.2d 396 (5th Cir. 1980)(dismissal for cause in capital case not harmless error); Moore v. Estelle, 670 F.2d 56, 57 (5th Cir. 1982)(same).

[36] *Gray*, 427 So. 2d at 425 (Sullivan, J., dissenting). Justice Sullivan noted that United States Supreme Court Justice William Rehnquist had characterized this mandate as a *per se* rule in his dissent to *Davis*. *Id.*; *see* Davis v. Georgia, 429 U.S. 122, 123-24 (1976)(Rehnquist, J., dissenting)(reversals for deviations in death penalty voir dire equivalent to *per se* rule).

[37] *Gray*, 427 So. 2d at 425 (Sullivan, J., dissenting).

[38] *See supra* notes, 2, 8, 19, 22 and accompanying text.

penalty voir dire procedures.[39] Although *Gray* currently stands as existing law in Mississippi, the decision rests on tenuous grounds. The ultimate decision rests with the United States Supreme Court which recently granted certiorari in this case. However, as it now stands, this decision could ultimately have far reaching effects in Mississippi criminal procedure.

II. Statutory Construction

A. Construction of the Mississippi Child Fondling Statute

In a controversial decision, the Mississippi Supreme Court construed Mississippi's child fondling statute in *McBrayer v. State*.[40]

Malcolm McBrayer, age 46, was arrested and convicted of fondling a minor under the age of fourteen as prohibited by section 97-5-23 of the Mississippi Code.[41] The alleged unlawful fondling eventually led to wholly consensual sexual relations between McBrayer and the minor.[42] The pair had been romantically involved for some time and McBrayer was arrested only after he and the minor attempted to leave the state to be married.[43] McBrayer was convicted and sentenced to serve ten

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[39] *See supra* notes 34-36.

[40] 467 So. 2d 647 (Miss. 1985).

[41] *Id.* at 647. Section 97-5-23 of the Mississippi Code provides:

> Any male person above the age of eighteen years, who, for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires, shall handle, touch, or rub with hands or any part of his body or any member thereof, any child under the age of fourteen years, with or without his consent, shall be guilty of a high crime and upon conviction thereof, shall be fined in any sum not less than ten dollars ($10.00) nor more than one thousand dollars ($1,000.00), or be imprisoned in the state penitentiary not less than one year nor more than ten (10) years, or be punished by both such fine and imprisonment, at the discretion of the court.

MISS. CODE ANN. § 97-5-23 (Supp. 1984). For the amended version of § 97-5-23, see MISS. CODE ANN. § 97-5-23 (Supp. 1985).

[42] *McBrayer*, 467 So. 2d at 648. The incident in question occurred at the minor's home without any substantial protest from the minor's mother. *Id.*

[43] *Id.* at 647. The record evidence indicated that the couple had engaged in wholly consensual sexual intercourse on at least three occasions. The minor and Mr. McBrayer were detained at a DeKalb bus stop enroute to Oklahoma where the couple was destined to be married. *Id.* at 647, 648.

years imprisonment.

On appeal, McBrayer argued that his conduct could not be punishable because it was wholly consensual in nature.[44] In reviewing the conviction, the Mississippi Supreme Court recognized that the legality *vel non* of sexual relationships between adults and minors had been addressed by the legislature in section 97-5-21 of the Mississippi Code, the statutory rape statute.[45] McBrayer had not been charged under this statute because the minor was not of previous chaste character, a statutory pre-requisite to conviction.[46] However, section 97-5-21 was the core statute from which all other statutes concerning sexual relationships between adults and minors derived their foundation.[47] Therefore, the two statutes would have to be construed together to determine whether the conviction could be upheld.[48]

The court noted that the child fondling statute, section 97-5-23, was merely a penumbral statute of the core statute, section 97-5-21.[49] Absent an express legislative declaration that the penumbral statute was intended to invade and modify the clear policy determinations of the core statute, the court was required to construe both statutes in *pari materia*[50] so that the penumbral statute would not do violence to the core statute.[51]

In light of this required construction, the court held that the actions of McBrayer would not support a conviction under section 97-5-23 of the Mississippi Code.[52] The court noted that the statutory rape statute would necessarily involve the same conduct contemplated under the fondling statute. However, under the state's theory of the case, sexual intercourse with mi-

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[44] *Id.* at 647.

[45] *Id.* at 647. Section 97-5-21 of the Mississippi Code makes criminal the seduction of a child under the age of eighteen, provided that the child is "of previously chaste character." MISS. CODE ANN. § 97-5-21 (Supp. 1984).

[46] *McBrayer*, 467 So. 2d at 647.

[47] *Id.* at 648.

[48] *Id.*

[49] *Id.*The court noted that in order to apply the child fondling statute to this case, a strained or literalistic reading would be required. *Id.*

[50] *Id. Pari materia* is defined as "construed with reference to." *See* BLACK'S LAW DICTIONARY 1004 (5th ed. 1979)(defining *pari materia*).

[51] *McBrayer*, 467 So. 2d at 648.

[52] *Id.*

nors under the age of fourteen, who were not of previously chaste character, would not result in a crime. However, the foreplay prior to the intercourse could result in ten years imprisonment.[53] Such a reading of the fondling statute would totally subsume the statutory rape statute in regard to victims under the age of fourteen, and would necessarily lead to illogical and arbitrary results.[54] Therefore, the court held that the case was controlled by the statutory rape statute, and that no crime had been committed.[55]

The significance of this case lies in the method of statutory construction employed by the Mississippi Supreme Court. Where there is a general statute designed to control a certain type of conduct, the court will use a *pari materia* construction for any penumbral statutes absent express legislative directives to the contrary.[56] *McBrayer* effectively forewarns the legislature of the potential results if it fails to recognize and review preexisting foundational statutes before enacting new legislation. Further, *McBrayer* demonstrates that the type of conduct involved will have no bearing on the court's decision. In fact, the Mississippi Supreme Court expressly recognized that the legislature is the exclusive authority for prescribing what conduct should be unlawful, and what corresponding punishment should be available for violations.[57] Nevertheless, the court will not al-

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[53] *Id.* The court found no evidence to suggest that the child fondling statute was intended to repeal the statutory rape statute and control this situation. *Id.*

[54] *Id.* The court refused to impute such an absurd result to an objective sought to be achieved by the legislature. *Id.*

[55] *Id.* The court recognized that § 97-5-21 of the Mississippi Code required that the minor be of "previously chaste character." Since the minor in this case had engaged in sexual relations on previous occasions with different men, the statutory rape statute had not been violated, and no crime had been committed by McBrayer. *McBrayer*, 467 So. 2d at 647-48; *see supra* note 45 and accompanying text (discussing statutory rape in Mississippi).

In a strongly worded dissent, Presiding Justice Walker joined by Justice Hawkins, emphasized that the statutes in question were clear and unambiguous. The majority's construction of the two statutes usurped the legislature's power to prohibit and punish such conduct. *McBrayer*, 467 So. 2d at 649 (Walker, J., dissenting). Further, the dissent pointed out that McBrayer did in fact fondle the thirteen-year old female without engaging in sexual intercourse. *Id.* Therefore, McBrayer could have been charged under the child fondling statute, and thus the conviction should have been affirmed. *Id.*

[56] *See supra* notes 48-50 and accompanying text.

[57] *McBrayer*, 467 So. 2d at 648. The court recognized that conduct of this nature

low hastily enacted statutes to lead to potentially absurd results.

B. Mississippi's Rape Statute Held to be Constitutional

In 1985, the Mississippi Supreme Court was asked to decide whether Mississippi's rape statute was violative of the equal protection clause of the United States Constitution in the case of *Harper v. State*.[58]

Willie C. Harper was tried and convicted for rape and sentenced to thirty-five years imprisonment by the Circuit Court of Scott County.[59] From that conviction, Harper appealed, arguing that the Mississippi statute under which he was convicted[60] violated the equal protection clause of the fourteenth amendment to the United States Constitution because the statute failed to establish a crime for the rape of a male.[61]

In its decision, the Mississippi Supreme Court noted that this was a question of first impression.[62] The court began its in-

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was both undesirable and damaging in our society. Nevertheless, the decision was inevitable in light of the mandatory method of statutory construction. However, the court added that the legislature was both empowered and encouraged to enact legislation to regulate such conduct. Any such prospective legislation would be faithfully enforced, provided that it could withstand the method of statutory construction employed by the court. *Id.* at 647-48.

[58] 463 So. 2d 1036 (Miss. 1985).

[59] *Id.* at 1036-37. The state introduced testimony through the prosecutrix that she knew her attacker through his voice. The two had known each other for years. *Id.* at 1037. Additional evidence conclusively placed Harper at the scene of the crime. *Id.*

[60] *Id.* at 1038. Harper was tried under § 97-3-65(2) of the Mississippi Code. This statute provides:

> Every person who shall forcibly ravish any female of the age twelve (12) years or upward, or who shall have been convicted of having carnal knowledge of any female above the age of fourteen (14) years without her consent . . . . [shall be subject to imprisonment in the state penitentiary] . . . .

MISS. CODE ANN. § 97-3-65(2) (Supp. 1984). Section 97-3-65(2) was later amended to read:

> Every person who shall forcibly ravish any person of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of any person above the age of fourteen (14) years without such person's consent. . .[shall be subject to imprisonment in the state penitentiary]. . .

MISS. CODE ANN. § 97-3-65(2)(Supp. 1985).

[61] *Harper*, 463 So. 2d at 1038-39.

[62] *Id.* at 1038. The court noted that it had construed a "peeping tom" statute as being constitutional even though it only punished males. *See* Green v. State, 270 So. 2d 695, 697 (Miss. 1972)(upholding constitutionality of gender based "peeping tom" stat-

quiry by reviewing section 97-3-5(2) of the Mississippi Code.[63] Under this statute, any person forcibly ravishing any female twelve years of age or older was subject to punishment by the state.[64] Clearly, Harper's acts violated the statute. However, Harper argued that as a member of a class of individuals (rapists of women) who had been unreasonably singled out for punishment from the total class of rapists (all individuals who commit rape regardless of the sex of the victim), his constitutional right to equal protection under the law had been violated.[65]

In rejecting his argument, the court pointed out that the Mississippi sexual battery statute[66] prohibited and punished the anal rape of a male by any person.[67] As such, rapists of women were not unreasonably singled out by the state as suggested by Harper.[68] Further, the court noted that several states[69] employed a rape statute similar to Mississippi's statute.[70] In every case, the courts of our sister states found sex to be a legitimate classification because it was reasonably related to a legitimate governmental objective, namely, protecting women from rape and any other damaging effects associated with the crime.[71] The convic-

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ute). However, the court stated that it had never used a similar analysis with Mississippi's rape statute. *Harper*, 463 So. 2d at 1038.

[63] *Harper*, 463 So. 2d at 1038; *see supra* notes 60-61 and accompanying text.

[64] *See* MISS. CODE ANN. § 97-3-65(2)(Supp. 1984)(prohibiting rape of women).

[65] *Harper*, 463 So. 2d at 1038.

[66] Section 97-3-95 of the Mississippi Code prohibits the sexual penetration of another person without his or her consent. Sexual penetration includes any penetration of the genital or anal openings of a person's body. *See* MISS. CODE ANN. § 97-3-95 (Supp. 1985)(prohibiting any person from committing sexual battery); MISS. CODE ANN. § 97-3-97(a)(Supp. 1985)(defining sexual penetration); MISS. CODE ANN. § 97-3-101 (Supp. 1985)(setting penalty for violation of sexual battery statute).

[67] *Harper*, 463 So. 2d at 1039.

[68] *Id.*

[69] *Id.* The court listed Arizona, Colorado, Georgia, Illinois, Kansas, Louisiana, Maryland, Minnesota, Montana, New York, Tennessee, Washington, West Virginia, and Wisconsin as a few states which employed a gender-based statute; *see* People v. Gould, 188 Colo. 113, 532 P.2d 953, 954 (1975)(upholding constitutionality of gender-based rape statute); Brooks v. State, 24 Md. App. 334, 330 A.2d 670, 673 (1975)(same); People v. McDonald, 86 Mich. App. 5, 272 N.W.2d 179, 182 (1978)(gender-based rape statute does not violate equal protection clause).

[70] *Harper*, 463 So. 2d at 1039.

[71] *Id.* The court found only one case which followed the defendant's argument. *See* Brinson v. State, 278 So. 2d 317, 322 (Fla. Dist. Ct. App. 1973)(gender-based rape statute violative of equal protection clause). *But see* Washington v. State, 302 So. 2d 401, 403

tion was affirmed and the statute was construed to be constitutional.[72]

The decision in *Harper* does not make any substantial changes in Mississippi's rape law, but does reinforce the constitutionality of using gender as a means of classification in criminal statutes.[73] The court points out that all rapists, no matter what the gender of their victims, are subject to criminal prosecution under the laws of the state.[74] The court's decision reaffirms the state's legitimate objective of protecting women from rape and the use of gender-based statutes to achieve this goal.

III. Change of Venue in Criminal Cases

The Mississippi Supreme Court also reviewed and modified the procedure to be employed by criminal defendants seeking to change venue in their cases. In *Johnson v. State*[75] and *Fisher v. State*[76], the court outlined a standard of review to be employed by lower courts in determining whether to grant such a change of venue.

Both *Johnson* and *Fisher* were strikingly similar in their facts. In *Johnson*, the defendant was tried and convicted of murder by the Lauderdale County Circuit Court.[77] The murder was particularly heinous and drew the almost exclusive attention of the media both before and during the trial.[78] At trial, the defendant sought to change venue on the ground that he could not possibly receive a fair trial in Lauderdale County, the scene of

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(Fla. 1974)(construing "carnal knowledge" to include rape of males and extending criminal sanctions against rape as protection for male as well as females), *cert. denied*, 421 U.S. 912 (1974).

[72] *Harper*, 463 So. 2d at 1042.

[73] *See supra* notes 66-72 and accompanying text.

[74] *See supra* notes 66-68 and accompanying text.

[75] 476 So. 2d 1195 (Miss. 1985).

[76] 481 So. 2d 203 (Miss. 1985).

[77] *Johnson*, 476 So. 2d at 1197. A convenience store was robbed and the attendant was brutally murdered. The defendant was captured at the scene of the crime after a brief encounter with Meridian police officers. *Id.* at 1198.

[78] *Id.* at 1211-12. Record evidence indicated that the local paper ran a total of sixty-four articles on the case, of which fifty-four appeared on the front page. Additional evidence showed that both the local radio and TV stations devoted extensive coverage to the case. *Id.* at 1212.

the crime, in light of the massive media blitz surrounding the case.[79] He offered supporting affidavits to bolster his motion and called fifteen witnesses to show that the community had prejudged his case.[80] Nevertheless, the trial judge denied the motion, and the defendant was subsequently convicted.[81]

In a two-part decision, the court reviewed the function of a motion for change of venue in criminal proceedings.[82] Justice Dan Lee, writing for the court, recognized that any decision to grant a change of venue rested in the sound discretion of the trial judge.[83] However, Justice Lee also stated that the right to a fair trial was of such extreme importance in our society that whenever the court was called upon to review the trial judge's decision, a heightened scrutiny would be required, especially where the defendant could be subjected to the death penalty as punishment for the crime.[84]

In reviewing the trial judge's decision, the court noted that the trial judge was required to act impartially, dispassionately, and with scrupulous objectivity.[85] According to the court, the right to a fair trial before an impartial jury was a fundamental and essential part of our society, guaranteed through the United States and Mississippi Constitutions.[86] Further, even though every criminal case involved the competing interests of the state and the accused, one right could not be sacrified at the expense

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[79] *Id.* at 1211.

[80] *Id.* Each witness testified that he had knowledge of the case based upon the media's attention, and added that they would not be able to provide the defendant with an impartial decision. *Id.* at 1211-12.

[81] *Id.* at 1208-09.

[82] *Id.* at 1198-1209. Further, Justice Roy Noble Lee, the presiding justice, addressed all additional assignments of error in Part I of the opinion. Each was rejected by the court. *Id.* at 1198-1208.

[83] *Id.* at 1209; *see* West v. State, 463 So. 2d 1048, 1053-54 (Miss. 1985)(decision to grant change of venue rests solely in trial judge's discretion).

[84] *Johnson*, 476 So. 2d at 1209-10; *see* Laney v. State, 421 So. 2d 1216, 1217 (Miss. 1982)(noting higher scrutiny applied in appeals where defendant's life is at stake); Irving v. State, 361 So. 2d 1360, 1363 (Miss. 1978)(same); Tennison v. State, 79 Miss. 708, 713, 31 So. 421, 422 (1902)(recognizing importance of change of venue in criminal cases).

[85] *Johnson*, 476 So. 2d at 1209.

[86] *Id.* at 1209; *see* U.S. CONST. amend. VI (defendant entitled to speedy and public trial before impartial jury in all criminal proceedings); MISS. CONST. art. III, § 26 (same); *see also* Adams v. State, 220 Miss. 812, 815, 72 So. 2d 211, 213 (1954)(recognized right to impartial jury).

of the other.[87]

In light of this, the court held that a change of venue applicant must show that the empaneling of an impartial jury was "merely" doubtful and added that such doubt would be implicit where public opinion was saturated with bias, hatred, and prejudice against the defendant.[88] Further, although the right to a change of venue was of paramount importance to the criminal defendant, such a right was not self-executing.[89] Instead, the criminal defendant was required to file an application for change of venue with the trial court and support this application with affidavits as required by statute.[90] Additionally, the court added that any presumption of prejudice against the criminal defendant could be rebutted by the state during voir dire.[91] However, if the pretrial publicity was of such magnitude that it caused irreparable harm to the defendant, the presumption would no longer be rebuttable.[92]

Applying these findings to the instant case, the court held that the defendant had completely satisfied all procedural re-

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[87] *Johnson*, 476 So. 2d at 1210. The court recognized that the state had a compelling interest in trying the accused in the locale of the crime. However, the court also noted that the accused had a significant interest in having his case tried before an impartial jury. *Id.*

[88] *Id.* at 1210. The court noted that previous Mississippi case law had developed this standard in order to uphold the defendant's right to a trial by an impartial jury, as guaranteed under both the United States Constitution and the Mississippi Constitution. *Id; see* Seals v. State, 208 Miss. 236, 249, 44 So. 2d 61, 67 (1950)(public opinion saturated with bias, hatred, and prejudice against defendant creates presumption of inability to empanel impartial jury); Eddins v. State, 110 Miss. 780, 783, 70 So. 898, 899 (1916)(change of venue required where there is showing that empaneling impartial jury is merely doubtful). The court held that these cases were to be read together to provide a standard for change of venue which satisfied both constitutions. *Johnson*, 476 So. 2d at 1210.

[89] *Johnson*, 476 So. 2d at 1210; *see* Gilliard v. State, 428 So. 2d 576, 579 (Miss. 1983)(right to change of venue not self-executing); Gentry v. State, 416 So. 2d 650, 651 (Miss. 1982)(same).

[90] *Johnson*, 476 So. 2d at 1210; *see* Gilliard v. State, 428 So. 2d 576, 579 (Miss. 1983)(requiring at least two affidavits in support of motion for change of venue); Wexler v. State, 167 Miss. 464, 473, 142 So. 501, 503 (1932)(setting forth procedure for applying for change of venue in criminal cases).

[91] *Johnson*, 476 So. 2d at 1211; *see* Mayola v. Alabama, 623 F.2d 992, 1000-01 (5th Cir. 1980)(recognizing state's ability to rebut during voir dire; presumption of prejudice to defendant where case is highly publicized).

[92] *Johnson*, 476 So. 2d at 1211.

quirements for obtaining a change in venue.[93] Further, the evidence offered in support of the motion for change of venue conclusively indicated extreme prejudice toward the defendant within the community, and effectively barred his chance for a fair trial in Lauderdale County.[94] The Court found that the trial judge had abused his discretion and ordered that the case be reversed and remanded.[95]

Less than a month later, the Mississippi Supreme Court reaffirmed the *Johnson* decision, again reviewing the rights of an accused to change the venue in his criminal trial, in *Fisher v. State*.[96]

In *Fisher*, the defendant was charged with the murder of an eighteen-year old girl in Lauderdale County. Again, media attention in Lauderdale County focused almost exclusively on that crime.[97] The defendant moved for a change of venue and the motion was denied by the trial court. Subsequently, he was convicted of the crime.[98]

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[93] *Johnson*, 476 So. 2d at 1213.

[94] *Id.* Record evidence indicated that the community was highly aware of the case, and was increasingly concerned due to its racial implications (victim was white and assailant was black). Each witness testified that the case was a main topic of conversation within the community and that most people felt the defendant was guilty. *Id.*

[95] *Id.* at 1213-14. The court looked to past cases involving similar publicity and noted that it had consistently reversed convictions which were handed down amidst prejudicial public sentiment. *See* Magness v. State, 103 Miss. 30, 48, 60 So. 3, 11 (1912)(murder conviction reversed in light of public sentiment that defendant was guilty); Owens v. State, 82 Miss. 31, 35, 33 So. 722, 723 (1903)(murder conviction reversed where jury's verdict was influenced by public prejudice).

In a dissent, Justice Roy Noble Lee argued that a motion to change venue was solely left to the discretion of the trial judge. *Johnson*, 476 So. 2d at 1218 (Lee, Roy Noble, J., dissenting). Citing Billiot v. State, 454 So. 2d 445 (Miss. 1984), he added that unless the judge's decision was clearly an abuse of discretion, the court had no right to disturb the judge's findings. *Johnson*, 476 So. 2d at 1218. In the instant case, the trial judge carefully reviewed all the relevant evidence before him and then rendered a decision. As such, Justice Roy Noble Lee felt that there was no clear abuse of discretion, and stated that the denial of motion for change of venue was not a reversible error. *Id.*

[96] 481 So. 2d 203 (Miss. 1985).

[97] *Id.* at 217-20. There had been a series of murders in Meridian prior to the defendant's arrest. Some stories in the local papers speculated that the defendant could have been involved with these crimes as well. However, the defendant was only charged with one murder. Nevertheless, the case continued to receive extreme publicity from the local papers, radio, and television. *Id.*

[98] *Id.* at 211. Fisher filed for a change of venue, but the trial judge stayed his decision until the conclusion of voir dire. *Id.* Thereafter, the motion was denied, and Fisher

In reviewing the case, the court reiterated the importance of the change of venue for a criminal defendant.[99] The court emphasized that such a motion was not a mere procedural point, but instead was a tool designed to protect the criminal defendant's most sacred right: the right to a fair trial before an impartial jury.[100] Unless an unbiased jury could be empaneled, the criminal defendant would be denied this basic constitutional right.[101] Additionally, the court reaffirmed *Johnson* and added that a motion for change of venue in criminal cases should ordinarily be granted where, under the totality of the circumstances, it appears likely that, in the absence of such relief, the accused's right to a fair trial could be lost.[102]

In the instant case, the court found that the media attention devoted to the case effectively linked the defendant to the crime, and in reality functioned to try and convict the defendant long before he was afforded an opportunity to defend himself in a court of law.[103] The extensive pretrial publicity created an irrebuttable presumption of prejudice against the defendant, and the case was reversed and remanded.[104]

The decisions in *Johnson* and *Fisher* are indicative of the Mississippi Supreme Court's desire to afford criminal defendants the utmost protection of their constitutional right to a fair trial before an impartial jury.[105] Each decision recognizes the potentially dangerous effect where there is excessive news coverage

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was subsequently convicted and sentenced to death. *Id.*

[99] *Id.* at 215. The court noted that the change of venue was one means of affording a criminal defendant protection of his constitutionally guaranteed right to a fair trial. *Id.* at 216.

[100] *Id.* The court noted that §§ 14 and 26 of Article III of the Mississippi Constitution had been construed to provide the accused in a criminal prosecution with a due process right to a fair trial. *Id.*; *see, e.g.*, Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950)(MISS. CONST. art. III, § 14 guarantees fair trial to accused criminals).

[101] *Fisher*, 481 So. 2d at 216.

[102] *Id.*

[103] *Id.* at 216-20.

[104] *Id.* at 220-23. The court concluded its discussion by commenting on the procedure used by the trial judge in ruling on the motion. The judge's decision to stay his ruling until after the voir dire was an acceptable procedure; however, the court recommended that the judge make his decision prior to summoning prospective jurors. *Id.* at 223-24.

[105] *See supra* notes 75-104 and accompanying text.

surrounding controversial criminal cases. In response, the court has revitalized a simple procedure that the criminal defendant may utilize to ensure that the state provides him with a fair trial.[106] Further, the court has emphasized the importance of the right to a fair trial by recommending that the lower courts generally grant motions for change of venue unless the state clearly demonstrates that the defendant will not be prejudiced.[107] The motion for change of venue now stands as one of the greatest protections in Mississippi for the criminal defendant's constitutional right to a fair trial.

IV. Admissibility of Certificates of Analysis as Proof of Identity of Controlled Substances

Section 13-1-114 of the Mississippi Code allows the state to prove the identity of a substance alleged to be an illegal controlled substance[108] by introducing a certificate of analysis from an analyst.[109] In *Barnette v. State*,[110] the Mississippi Supreme Court was asked to decide whether this statute violated a criminal defendant's right to confront witnesses against him as guaranteed by the United States and Mississippi Constitutions.[111]

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[106] *See supra* notes 78-80, 94, 97 and accompanying text.

[107] *See supra* notes 88-92, 100-102 and accompanying text. In *Fisher*, Justice Robertson recognized that cases of this nature necessarily involve a variety of competing interests. The news media was guaranteed freedom of press by the Constitution of the United States. *Fisher*, 481 So. 2d at 206. Further, the state had a substantial interest in prosecuting the defendant in the county where the crime occurred. *Id.* at 216. Although these interests were significant, Justice Robertson noted that they could not override the fundamental right to a fair trial afforded to criminal defendants through the federal and state constitutions. *Id.* at 215-16.

[108] *See* Miss. Code Ann. § 41-29-113 (Supp. 1985)(defining Schedule I controlled substances); Miss. Code Ann. § 41-29-117 (Supp. 1985)(defining schedule III illegal controlled substances); Miss. Code Ann. § 41-29-119 (Supp. 1985)(defining schedule IV illegal controlled substances); Miss. Code Ann. § 41-29-121 (Supp. 1985)(defining Schedule V illegal controlled substances).

[109] *See* Miss. Code Ann. § 13-1-114 (Supp. 1985)(providing for proof of identity of alleged controlled substance by certificate of chemical analysis).

[110] 481 So. 2d 788 (Miss. 1985).

[111] *Id.* at 790. The sixth amendment to the United States Constitution provides that a criminal defendant shall be afforded the right to confront all witnesses against him in any criminal prosecutions. *See* U.S. Const. amend. VI (securing criminal defendant's right to confront witnesses against him). In addition, article III, § 26 of the Mississippi Constitution reflects a similar right as that guaranteed by the sixth amendment of the

Hernando Barnette was arrested for allegedly selling cocaine to an undercover police officer.[112] At trial, the state, over Barnette's objection, introduced into evidence a certificate of analysis identifying the alleged substance as cocaine.[113] The trial court allowed the certificate to be admitted, and Barnette was convicted and sentenced to serve twelve years in the penitentiary.[114]

On appeal, Barnette argued that proof of the identity of the substance by certificate of analysis was unconstitutional because it denied him his right to confront all witnesses against him.[115] Writing for the court, Justice Sullivan noted that due process of law required the state to prove each element of the crime charged beyond a reasonable doubt.[116] In a crime involving the alleged sale of a controlled substance, evidence that the substance was controlled by state statute was a prerequisite to a valid conviction.[117] Therefore, in order to prove the identity of the substance, the state was required to perform a chemical analysis.[118] However, if the state was allowed to prove this essential element of the crime by merely introducing the certificate without the consent of the defendant, the constitutional burden of proof placed on the state would be lessened, and the criminal defendant would be denied his right to confront the witnesses

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United States Constitution. *See* MISS. CONST. art. III, § 26 (guaranteeing right of confrontation against witnesses to criminal defendants).

[112] *Barnette*, 481 So. 2d at 789. The alleged sale occurred outside a nightclub in Laurel, Mississippi. *Id.*

[113] *Id.* at 790.

[114] *Id.* at 790. Additionally, the Jones County Circuit Court fined Barnette $5,000, and assessed court costs. *Id.* at 789.

[115] *Id.* at 790. Barnette argued that the analyst who performed the analysis was constitutionally required to appear at trial in order to preserve his right to cross-examine that witness. Introduction of the certificate prevented this cross-examination. *Id.*

[116] *Id.* at 791. The court noted that the United States Supreme Court, as well as the Mississippi Supreme Court, had placed the burden of proof on the state in all criminal cases. *Id.*; *see* In Re Winship, 397 U.S. 358, 364 (1970)(government has burden of proof in criminal prosecutions); Watson v. State, 465 So. 2d 1025, 1031 (Miss. 1985)(state retains burden of proof in all criminal prosecutions); Edwards v. State, 469 So. 2d 68, 70 (Miss. 1970)(same).

[117] *Barnette*, 481 So. 2d at 791; *see also* MISS. CODE ANN. § 41-29-139 (Supp. 1985)(setting forth elements of proof of criminal sale of controlled substances).

[118] *Barnette*, 481 So. 2d at 791.

against him.[119] Accordingly, the trial judge committed a reversible error by admitting the certificate of analysis into evidence without the testimony of the analyst.[120]

Although the trial court had committed reversible error in admitting the certificate, Justice Sullivan noted that an unconstitutional application of the statute did not necessarily imply that the statute was unconstitutional on its face. Instead, the court was required to construe the statute, if reasonable, in a manner which would uphold its constitutional validity.[121] Such a construction required the court to look to the purpose of the statute, the objective sought to be accomplished through the statute, and the intent of the legislature in enacting the statute.[122]

In its analysis, the court noted that the purpose and objective behind the statute was to provide proof of the identity of the substance without requiring testimony by the analyst.[123] Next, the court looked to the language of the statute itself to determine how the legislature intended to achieve such a purpose.[124] Subdivision 1 of the statute allowed the certificate to be used only as substantive evidence of the facts and results stated therein.[125] However, the court found that the statute required the testimony of the analyst to be presented with the certificate unless the defendant waived this requirement at pre-trial, and such a waiver was consented to by the prosecuting attorney.[126] Further, subdivision 2 of the statute allowed either party to object to the introduction of the certificate even though a waiver

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[119] *Id.* at 792.

[120] *Id.* at 791.

[121] *Id.* at 791. The court stated that where a literal construction of the statute would render it unconstitutional, the court must adopt a construction which would save the statute if possible. *Id.*; *see* Jackson v. State, 337 So. 2d 1242, 1251 (Miss. 1976)(court required to construe statutes to meet constitution if possible).

[122] *Barnette*, 481 So. 2d at 791; *see* Akers v. Estate of Johnson, 236 So. 2d 437, 439 (Miss. 1970)(court required to look to legislative intent when construing statutes).

[123] *Barnette*, 481 So. 2d at 791; *see* 1979 MISS. LAWS ch. 389 (noting that § 13-1-114 of Mississippi Code was intended to allow identification of controlled substances by certificate of analysis rather than personal appearance of analyst).

[124] *Barnette*, 481 So. 2d at 792.

[125] *Id.* at 792.

[126] *Id.*; *see* Stringer v. State, 233 So. 2d 779, 780 (Miss. 1970)(right to confront may be waived).

and consent had been agreed upon at pre-trial.[127] Where such an objection was made, the analyst would be required to testify at trial.[128] Accordingly, the court found that the statute was constitutional, provided that the court followed the above-described mode of application.

Through *Barnette*, the Mississippi Supreme Court has created strict procedural guidelines to be followed where the identity of an alleged controlled substance is sought to be proved through the admission of certificates of analysis.[129] These guidelines were designed to protect the criminal defendant's constitutional right to confront all witnesses against him, and to provide the state with a quick method of identification of controlled substances in a limited number of cases.[130] Although the state's potential use of section 13-1-114 has been severely limited, the court's interpretation upholds the validity of the statute without infringing upon the rights of the criminal defendant.

V. Jury Instructions

A. Self-Defense Jury Instruction

In *Flowers v. State*,[131] the Mississippi Supreme Court held that a self-defense jury instruction which stated that a party who acted upon "mere fear, apprehension or belief, however sincerely entertained" would not be justified in taking life and acted at his own peril, was an improper jury instruction and amounted to reversible error.[132]

James Willie Flowers was indicted for murder in the Circuit Court of Washington County for the shooting death of Joe Lee Edison.[133] Flowers was subsequently convicted[134] of manslaugh-

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[127] *Barnette*, 481 So. 2d at 792.

[128] *Id.*

[129] *See supra* notes 123-128 and accompanying text.

[130] *See supra* notes 115-122 and accompanying text.

[131] 473 So. 2d 164 (Miss. 1985).

[132] *Id.* at 164.

[133] *Id.*

[134] *Id.* It was undisputed that on the night of December 24, 1981, Flowers shot and killed Edison in the Blue Note Cafe in Greenville. *Id.* However, the state's evidence contradicted sharply with the defense's evidence on what caused the shooting. *Id.* The

ter and sentenced to twelve years imprisonment. At trial, the court granted the state's jury instruction on self-defense. The pertinent section of the instruction provided:

> [H]ence mere fear, apprehension or belief, however sincerely entertained by the slayer, that another designs to take his life or to do him great bodily harm will not justify the slayer in taking the life of the latter party. The slayer may have a lively apprehension that his life is in danger or that he is in danger of great bodily harm, and believe the grounds of his apprehension just and reasonable, and yet he acts on his own peril.[135]

On appeal, Flowers assigned as error that the court improperly granted this instruction.[136] The Mississippi Supreme Court agreed with the defense that in this case, with evidence conflicting in every possible degree as to the material facts, it was likely that this instruction unfairly diluted Flowers's evidence that he fired in self-defense.[137] It was the court's opinion that the instruction had the likely effect of denying the appellant his legal right to a proper self-defense instruction based upon the evidence.[138]

The court in *Flowers* noted that this instruction has received attention since 1983 when it came under criticism in the case of *Robinson v. State*.[139] In *Robinson*, several of the justices were of the opinion that the instruction was "too long, redundant and confusing."[140] In *Bebley v. State*,[141] the court stated

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state's witnesses stated that Flowers's gun was the only visible weapon in the nightclub at the time of the incident. *Id.* The defense offered testimony that Flowers shot Lee because Lee and his brother had two guns pointed at him which necessarily caused him to fear for his own life. *Id.*

[135] *Id.* at 164-65.

[136] *Id.* at 164. Defense counsel had objected to the language used in this instruction at trial. *Id.* at 165.

[137] *Id.* at 166.

[138] *Id.*

[139] 434 So. 2d 206 (Miss. 1983).

[140] *Id.* at 207. The majority of the *Robinson* court was of the opinion that the instruction did correctly state the law. *Id.* However, the court stated that it would be wise for district attorneys to substitute the following instruction for the one used by the trial court:

> The court instructs the jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design

that "[A]ny use of the instruction in cases tried after *Robinson* was published will be closely scrutinized. A word to the wise should be sufficient."[142]

The *Flowers* court then stated that its criticism of the instruction had been construed to mean that the instruction was approved for continued use, when in fact the court intended that it be discontinued.[143] To remove any doubt, the court expressly condemned the instruction, and held that it constituted reversible error in the instant case and would be so considered in future cases.[144] The court then expressly overruled eighteen prior Mississippi cases insofar as they held that this instruction was a proper statement of the law.[145]

B. Jury Instruction That is Inadequate in Form or Content

In *Harper v. State*,[146] the Mississippi Supreme Court announced a new principle of law that placed an additional burden on trial judges in the area of jury instructions.

John L. Harper was found guilty of burglary of an inhabited

> on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant acts.

Id.; *see* Scott v. State, 446 So. 2d 580, 583-84 (Miss. 1984)(instruction was self-contradictory and confusing, and should not be used upon retrial).

[141] 456 So. 2d 775 (Miss. 1984).

[142] *Id.* at 756. The *Bebley* court noted that an alternative instruction had been suggested in *Robinson*. *Id. Bebley* was tried at a time when *Robinson* had not been published in the Southern Reporter, and the court stated that this explained the continued use of the old instruction. *Id.*

[143] *Flowers*, 473 So. 2d at 165.

[144] *Id.*

[145] *Id.* at 165-66. Cases overruled were: Robinson v. State, 434 So. 2d 206 (Miss. 1983); Drungo v. State, 409 So. 2d 1323 (Miss. 1982); Bright v. State, 349 So. 2d 503 (Miss. 1977); Corbin v. State, 220 So. 2d 299 (Miss. 1969); Shinall v. State, 199 So. 2d 251 (Miss. 1967); Shields v. State, 244 Miss. 543, 144 So. 2d 786 (1962); Dobbs v. State, 200 Miss. 595, 29 So. 2d 84 (1947), *cert. denied*, 331 U.S. 787 (1947); Holmes v. State, 199 Miss. 137, 24 So. 2d 90 (1945); Coleman v. State, 198 Miss. 519, 22 So. 2d 410 (Miss. 1945); Bailey v. State, 174 Miss. 453, 165 So. 122 (1936); Callas v. State, 151 Miss. 617, 118 So. 447 (1928); Ransom v. State, 149 Miss. 262, 115 So. 208 (1928); Johnson v. State, 140 Miss. 889, 105 So. 742 (1925); Scott v. State, 56 Miss. 287 (1879); Kendrick v. State, 55 Miss. 436 (1877); Evans v. State, 44 Miss. 762 (1871); Head v. State, 44 Miss. 731 (1871); and Wesley v. State, 37 Miss. 327 (1859).

[146] 478 So. 2d 1017 (Miss. 1985).

dwelling and on January 24, 1984, was sentenced to ten years imprisonment, five years of which were suspended.[147] On appeal, Harper contended that the evidence was insufficient as a matter of law to establish an essential element of the offense, that he broke into and entered the dwelling with intent to commit some crime.[148] The trial court had not allowed the lesser included offense instruction on trespass, which Harper would have been guilty of if he had been found not to have entered the dwelling with intent to commit a crime, to be presented to the jury.[149]

The Mississippi Supreme Court held that Harper had offered testimony that presented a plausible alternative explanation of his presence in the dwelling.[150] Under these circumstances, the court held that the lesser included offense instruction should have been given.[151] The court noted that defense counsel had tendered a jury instruction on trespass which, in the court's words, was "at best inartfully drawn and at worst an unacceptable inadequate presentation of the lesser included

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[147] *Id.* at 1019. On the night of November 11, 1982, Harper became intoxicated and at approximately 2:30 A.M. drove out to the home of his ex-wife and her new husband, Jeff Foster. *Id.* at 1018. Harper kicked on the door, woke everyone up, and demanded that he be allowed to see his daughter before she was taken to Texas. *Id.* When Harper was refused entrance, he kicked out a four-foot by eight-foot picture window and burst into the living room. *Id.* Foster testified that Harper said he was going to kill Foster. *Id.* Therefore, Foster fired two shots hitting Harper in the stomach and shoulder. *Id.* at 1019.

At trial, Harper denied any intent to harm anyone or commit any crime once inside the Foster home, and repeatedly said that his only purpose in entering the home was to see his child before she was taken to Texas. *Id.* Despite his aggressive conduct, Harper maintained that Foster initiated the altercation by firing the gun. *Id.* Notwithstanding his contentions, Harper was subsequently found guilty of burglary. *Id.*

[148] *Id.*

[149] *Id.* at 1020.

[150] *Id.* at 1021; *see supra* note 147.

[151] *Harper*, 478 So. 2d at 1021. Citing Ruffin v. State, 444 So. 2d 839 (Miss. 1984), the court held that a lesser included offense instruction may be denied only where the evidence would justify a conviction on the principle charge alone. *Harper*, 478 So. 2d at 1021. The court held that the evidence in this case was not such that, under *Ruffin*, would justify a conviction on the principle charge of burglary. *Id.* The court held that a lesser included offense instruction should be granted unless the trial judge could say, considering the evidence in the light most favorable to the accused, and taking all reasonable inferences which could be drawn in favor of the accused from the evidence, that no prudent jury could find the defendant guilty of the lesser included offense. *Id.*

offense of trespass to the jury."[152] This raised the question of what the duty of the trial judge is in a criminal case when a defendant is entitled to an instruction on a particular issue, and the tendered instruction on that issue is, for one reason or another, unacceptable in form or content.

The court, building on the policy pronouncements of *Newell v. State*[153] and *Thomas v. State*,[154] announced that the trial judge has a definite responsibility regarding a lesser offense jury instruction. The court announced a new rule of procedure, holding that where the evidence shows that a party is entitled to have the jury instructed regarding a particular issue, and where that party requests an instruction which, for whatever reason, is inadequate in form or content, the trial judge has the responsibility either to reform and correct the proffered instruction himself, or to afford counsel a reasonable opportunity to prepare a new, corrected instruction.[155] Where the trial judge fails in this duty, and where the proffered instruction relates to a central issue in the case which is not covered by any other instruction given to the jury, the court will reverse.[156] Accordingly, because the trial judge had not adhered to this requirement in the instant case, the court reversed and remanded for a new trial.[157] This holding was not without dissent. Presiding Justice Roy Noble Lee felt that the trial judge did not commit reversible error in refusing to grant the trespass instruction, or submit a modified instruction on trespass.[158] Justice Hawkins voiced his objec-

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[152] *Harper*, 478 So. 2d at 1022.

[153] 308 So. 2d 71 (Miss. 1975). *Newell* holds that the trial judge may submit written instructions in addition to the instructions submitted by the litigants if he believes that justice requires him to do so. *Id.* at 78. The judge may also modify the instructions submitted by the parties if he deems it to be necessary. *Id.*

[154] 278 So. 2d 469 (Miss. 1973). In *Thomas*, the court noted that a jury instruction was inartfully drawn but held that it should have been granted since there was no other instruction clearly showing the required element essential to prove the alleged crime. *Id.* at 472. The *Harper* court read this holding as a policy pronouncement holding that where the disputed instruction relates to a central feature of the case, and where there is no other instruction before the court which treats the matter, it is error to refuse an instruction on grounds that it was inartfully drawn. *Harper*, 478 So. 2d at 1022.

[155] *Harper*, 478 So. 2d at 1022.

[156] *Id.* at 1023.

[157] *Id.*

[158] *Harper*, 478 So. 2d at 1023 (Lee, Roy Noble, J., dissenting). Presiding Justice

tion by stating: "The majority has gone beyond the facts of this case to announce a new principle of law, and in my view, bad law. An unnecessary burden has been placed upon the circuit judge, one that will create more problems than it will solve."[159]

VI. Effective Assistance of Counsel

In *Gilliard v. State*,[160] the Mississippi Supreme Court adopted the rule set forth by the United States Supreme Court in *Strickland v. Washington*[161] for deciding whether a defendant had received effective assistance of counsel.

Robert C. Gilliard, Jr. was convicted of capital murder by the Circuit Court of Jones County. His death sentence was affirmed by the Mississippi Supreme Court in the 1983 case of *Gilliard v. State*.[162] The court granted Gilliard's application for leave to file petition for writ of error *coram nobis* to the Mississippi Supreme Court after the United States Supreme Court denied petition for writ of certiorari.[163] The cause was remanded to the Circuit Court of Jones County for an evidentiary hearing on

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Lee viewed the evidence in this case to be overwhelming that Harper committed the crime of burglary in breaking and entering the Foster home. *Id.* at 1023. Lee's position was that Harper's contention that he did not form the intent to assault Foster until after he crashed through the picture window was negated by his conduct before and after the breaking. *Id.* at 1024. Lee further contended that Harper's conduct bore out his intention to commit an assault. *Id.* In addition, Lee did not interpret *Newell v. State*, *supra* note 153, as mandating that the trial judge modify or submit instructions on behalf of any party in a lawsuit. *Harper*, 478 So. 2d at 1025. Lee stated that *Newell* only gave the judge authority to initiate written instructions or to modify the instructions submitted by the parties if the judge, in his discretion, felt he should do so. *Id.*

[159] *Harper*, 478 So. 2d at 1025 (Hawkins, J., dissenting). Justice Hawkins felt that since the opposing counsel was under a duty to point out what was wrong with any instruction to which he had an objection, the court should not have placed the additional burden upon the trial judge. *Id.* at 1026. Justice Hawkins felt that if the opposing counsel did not object and inform the court of his reason for objecting, the instruction should be given. *Id.* However, if the judge concluded that there was a flaw in an instruction and the opposing counsel had not objected, the judge should then inform counsel of the specific reason why he would not give the instruction. *Id.* Justice Hawkins's position was that only in such an unusual case as this should the judge be under any affirmative duty to inform counsel about what was wrong with his instruction. *Id.*

[160] 462 So. 2d 710 (Miss. 1985).

[161] 466 U.S. 668 (1984).

[162] 428 So. 2d 576 (Miss. 1983).

[163] *Gilliard*, 462 So. 2d at 712 (Miss. 1985).

two questions,[164] one of which was whether Gilliard had been denied effective assistance of counsel at his guilt and sentencing trials. The circuit court resolved both questions against Gilliard. The petitioner appealed to the Mississippi Supreme Court.[165]

In deciding whether Gilliard had received effective assistance of counsel, the Mississippi Supreme Court adopted the United States Supreme Court's most recent ruling on the issue as set forth in the *Strickland* case.[166] The *Strickland* Court articulated certain principles dealing with this question.[167] Justice O'Connor stated that there was a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and to prevail, the defendant must overcome this presumption.[168] She then established a two-prong test to deal with the question of effectiveness of counsel.[169] Adopting this test, the Mississippi Supreme Court stated: "a) The petitioner must show that counsel's conduct was so deficient that he was not functioning as counsel guaranteed by the Sixth Amendment, and b) If the petitioner can show that the counsel was ineffective, then he must show that he was prejudiced by counsel's mistakes."[170] Additionally, the court stated: "The defend-

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[164] *Id.* The two questions that the Mississippi Supreme Court remanded to the Circuit Court of Jones County were: "(1) Petitioner should be granted a new trial in view of the unconstitutional aspects of his plea of guilty. (2) Petitioner was denied the effective assistance of counsel at his guilt and sentencing trials in violation of the Sixth, Eighth and Fourteenth Amendments." *Id.*

[165] *Id.*

[166] *Id.* at 714.

[167] *Id.*

[168] *Strickland*, 466 U.S. at 689. The United States Supreme noted in *Strickland* that it was very easy for a court or a defendant to second guess an attorney's actions and conclude that a particular act or omission of the attorney was unreasonable. *Id.* The Court stated that in order to fairly assess an attorney's conduct, a court should make every effort to eliminate the effects of hindsight, and evaluate the conduct from the attorney's perspective at the time. *Id.* Because of the difficulty of making this evaluation, the Court stated that the defendant must overcome the presumption that the challenged conduct of the attorney was in fact sound trial strategy. *Id.* at 689-90. Therefore, a court deciding a competency of counsel claim should judge the attorney's actions based on the facts of the particular case viewed as of the time of the attorney's actions. *Id.* The court should then determine whether the attorney's actions were in fact outside the range of professional competent assistance, keeping in mind that the attorney was presumed to have made competent decisions in the exercise of reasonable professional judgment. *Id.*

[169] *Id.* at 687.

[170] *Gilliard*, 462 So. 2d at 714. The *Strickland* Court had held that in order to show

ant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[171]

Applying the *Strickland* standard to the nine alleged errors asserted by Gilliard,[172] the Mississippi Supreme Court found

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that the defendant was prejudiced by such mistakes, the defendant must show that his counsel's mistakes were so serious as to deprive him of a fair trial. *Strickland*, 466 U.S. at 687. A fair trial is one which yields a reliable result. *Id.*

Citing Gideon v. Wainwright, 372 U.S. 335 (1963), Johnson v. Zerbst, 304 U.S. 458 (1938), and Powell v. Alabama, 287 U.S. 45 (1932), the United States Supreme Court recognized that the right to counsel existed, and was needed to protect the fundamental right to a fair trial. *Strickland*, 466 U.S. at 684. The Court held that the basic elements of a fair trial were defined through provisions of the sixth amendment which included the counsel clause which stated:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. at 685 (quoting U.S. CONST. amend.VI).

The Court noted that the right to counsel played a very important part in our trial system because it was the lawyer's skill and knowledge that enabled the defendant to properly defend himself against the prosecution's case. *Strickland*, 466 U.S. at 685.

[171] *Gilliard*, 462 So. 2d at 714 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). The Court in *Strickland* stated that a court hearing an ineffectiveness claim should consider all of the evidence that was before the judge or jury. *Strickland*, 466 U.S. at 695. The Court noted that some evidence would have been unaffected by the attorney's errors, while other evidence would be so affected as to alter the entire evidentiary picture. *Id.* at 695-96. A court should therefore take all the evidence into consideration and determine if the defendant has met his burden of showing that the decision reached would have been different absent the error. *Id.* at 696.

The Court then stated that all of the principles that it had set forth in *Strickland* were not automatic, mechanical rules. *Id.* These principles should only furnish guidelines for the decision maker with the ultimate focus of the inquiry being on the fundamental fairness of the proceeding being challenged. *Id.*

[172] *Gilliard*, 462 So. 2d at 714. The nine errors alleged by Gilliard were as follows:

> 1) The trial counsel improperly assisted the petitioner to have a preliminary hearing granted in this case. 2) Petitioner's counsel did not comply with the Mississippi statute concerning the raising of the question of change of venue. 3) The trial counsel failed to request individual sequestered voir dire during the selection of the jury for the sentence trial. 4) The trial counsel failed to provide effective assistance of counsel by failing to introduce proof that the state systematically excluded blacks not only from this trial, but from other trials. 5) The defense counsel permitted the petitioner to plead guilty to delib-

that the errors did not constitute ineffective assistance of counsel.[173]

In *Leatherwood v. State*,[174] the court again addressed an ineffective assistance of counsel claim using the guidelines of *Strickland v. Washington*.[175] Michael Dale Leatherwood filed a motion with the Mississippi Supreme Court to vacate his conviction for capital murder.[176] Leatherwood contended that his counsel had failed to adequately research the law for his case; that his counsel failed to raise potential defenses; and that his counsel did not adequately prepare for the sentencing phase of the trial.[177] Because of these deficiencies, Leatherwood con-

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erate, intentional murder when, prior to the plea of guilty, there had been elicited from his client a statement that contradicted the plea. 6) The defense counsel should not have allowed his client to enter a plea of guilty to the first count of the indictment of capital murder in view of the recent decision of *Enmund v. Florida*. 7) The defense counsel provided ineffective assistance of counsel by allowing the District Attorney to point out that a sentenced life inmate could be eligible for parole in ten years. 8) The petitioner was denied effective assistance as no competent counsel would fail to take advantage of the right to make an opening statement in a death penalty case. 9) The fact that the inducement or deal made by the co-defendant was not instructed on by the court was directly the responsibility of ineffective assistance of counsel on behalf of the defense counsel.

Id. at 714-16.

[173] *Id.* at 717.

[174] 473 So. 2d 964 (Miss. 1985).

[175] *See supra* notes 170-71 and accompanying text.

[176] *Leatherwood*, 473 So. 2d at 966.

[177] *Id.* at 966-67. Leatherwood's contention was that his attorney had advised him that the state would be limited in its presentation of evidence at the sentencing phase of the trial if Leatherwood pled guilty. *Id.* at 968. The court held that this was not the law because a guilty plea would not restrict the state from offering any evidence that would have been admissible during the guilty phase. *Id.* Leatherwood contended that his counsel had advised him to plead guilty due to the attorney's failure to research the law. *Id.*

Leatherwood's second claim, that his counsel failed to raise potential defenses, stemmed from Leatherwood's assertion that his counsel should have presented certain available psychological evidence that had been developed in Leatherwood's trial in Louisiana. *Id.* at 967. Leatherwood contended that his counsel knew of this evidence and that it would have been of help in the instant case. *Id.*

Leatherwood's third claim was based on the fact that several character witnesses were allegedly available and could have been procurred to testify for Leatherwood at his sentencing hearing had his counsel investigated the matter. *Id.* Leatherwood contended that because of his guilty plea, his life depended on the evidence presented at the sentencing hearing. *Id.* Therefore, his attorney should have explained to him the importance of having character witnesses at the hearing. *Id.*

tended that he was deprived of his constitutional right to effective assistance of counsel.[178]

Citing *Strickland*, the *Leatherwood* court announced that the standard for deciding the issue of effective assistance of counsel was "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[179] The test is predicated on the attorney's highly important role in assuring that the adversarial system provides a just result.[180]

The court stated that the standard of performance to which counsel would be held was "reasonably effective assistance."[181] The defendant was then required to show that the acts or omissions of counsel were the result of unreasonable legal assistance.[182] All of the evidence before the judge or jury, not just the circumstances that were affected by error, would be considered in determining whether the defendant had been prejudiced.[183]

The court restated the presumption that counsel had acted within the wide range of reasonable professional conduct.[184] Coupled with this presumption was another presumption that decisions made by counsel were strategic decisions made in the client's best interests.[185]

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[178] *Id.* at 966.

[179] *Id.* at 968 (quoting Strickland v. Washington, 466 U.S. at 686 (1984)). The *Strickland* Court stated that to give meaning to the requirement of effective assistance of counsel, it must use as its guide the purpose of the requirement which was to ensure a fair trial. *Strickland*, 466 U.S. at 686. The Court then established the benchmark for maintaining this purpose to be whether the attorney's conduct was so unreliable as to produce an unfair trial. *Id.; see also* Wilcher v. State, 479 So. 2d 710, 712 (Miss. 1985)(defendant must show deficient performance by counsel which so unduly prejudices his cause that result would be unreliable).

[180] *Leatherwood*, 473 So. 2d at 968.

[181] *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[182] *Leatherwood*, 473 So. 2d at 968.

[183] *Id.* at 969.

[184] *Id.; see supra* note 168.

[185] *Leatherwood*, 473 So. 2d at 969. The United States Supreme Court in *Strickland* stated that courts should keep in mind that an attorney's function was to make the adversarial testing process work in that particular case. *Strickland*, 466 U.S. at 680. The Court held that even the best attorneys would not handle successive cases in the exact same way because there are numerous ways to provide effective assistance in any particular case. *Id.* To second guess the attorney on his strategy choices in every case and to set rigid requirements for effective assistance would "dampen the ardor and impair the

Applying these principles to the specific allegations made by Leatherwood, the Mississippi Supreme Court found that Leatherwood had raised sufficient allegations to place in question the effectiveness of his counsel prior to his guilty plea and during the sentencing phase of his trial.[186] The court noted that even if counsel were shown to have committed some error, the defendant must also make an affirmative showing of prejudice which resulted from the error.[187] Not every error of counsel warranted the setting aside of a judgment.[188] The petitioner must make an affirmative showing of prejudice resulting from the error which had a probable effect on the outcome of the judgment.[189] The court therefore remanded the case to the circuit court to conduct a hearing and make findings of fact as to whether Leatherwood received effective assistance of counsel under the guidelines of *Strickland*.[190] If the lower court found that Leatherwood received ineffective assistance of counsel, the court should set a date for retrial subject to the state's right to appeal that decision.[191]

VII. Conclusion

As one can readily see, the Mississippi Supreme Court ruled in many diverse areas of criminal law in 1985. Decisions by the court which were most significant focused on strict adherence to voir dire procedures in death penalty cases, construction of the Mississippi Child Fondling Statute, confirmation of the constitutionality of Mississippi's rape statute, requirements for change of venue in criminal cases, admissibility of certificates of analy-

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independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.*

[186] *Leatherwood*, 473 So. 2d at 971. The court admitted that there was much it did not know about this case because it had been presented with only one side of the argument. *Id.* at 970. Therefore, the court determined that on remand the lower court should thoroughly develop testimony as to counsel's actions prior to Leatherwood's trial and determine if Leatherwood's allegations were true, and accordingly, what weight should be given them in light of *Strickland*. *Id.*

[187] *Id.* at 971.

[188] *Id.* at 970-71.

[189] *Id.* at 971.

[190] *Id.*

[191] *Id.*

sis as proof of identity of controlled substances, jury instruction for self defense, inadequacy of jury instruction in form or content, and effective assistance of counsel. Perhaps the most important decision of the year was the court's acceptance in *Gray v. State* of a deviation from strict voir dire procedures in death penalty cases. However, because of the grant of certiorari by the United States Supreme Court, the ultimate result in *Gray* remains to be seen.

The importance of the other areas of criminal law should not be overlooked. Those cases discussed in this article, while not all inclusive, are representative of the more important aspects of criminal law in Mississippi in 1985.

Hank Ros
Bill Stennett

MISCELLANEOUS

In 1985, the Mississippi Supreme Court decided a number of cases concerning child custody and support,[1] divorce[2] as well as other areas

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[1] Decisions handed down in 1985 that will not be treated textually include: Crowson v. Moseley, 480 So. 2d 1150, 1152 (Miss. 1985)(determination of child custody does not involve marital fault; child custody should not be used to punish offending spouse); Owens v. Huffman, 481 So. 2d 231, 232, 244 (Miss. 1985)(chancellor not bound to give full faith and credit to court order issuing from another state where affected child was never afforded protection of Uniform Child Custody Jurisdiction Act (UCCJA)); Carr v. Carr, 480 So. 2d 1120, 1122-23 (Miss. 1985)(best interest of child is paramount consideration in child custody case; adultery of mother, while a factor, does not alone preclude custody); Taylor v. Taylor, 478 So. 2d 310, 313 (Miss. 1985)(custodial parent has no standing to bring action or seek support for child that has attained majority); Pellegrin v. Pellegrin, 478 So. 2d 306, 307 (Miss. 1985)("tender years" doctrine is only one factor in determining child custody, with paramount consideration being best interest of child); Siegel v. Alexander, 477 So. 2d 1345, 1346 (Miss. 1985)(UCCJA controls in action to modify child custody decree); Walker v. Luckey, 474 So. 2d 608, 611 (Miss. 1985)(UCCJA was designed to prevent "interstate child" phenomenon, where custody decree is entered in one state and parent removes child to another state to have custody modified); Hill v. Hill, 481 So. 2d 227, 229 (Miss. 1985)(UCCJA requires Mississippi courts to decline jurisdiction where child has been wrongfully detained within its jurisdiction unless potential harm to child outweighs custodial misconduct); Wade v. Lee, 471 So. 2d 1213, 1216-17 (Miss. 1985)(county judge in habeas corpus proceeding may alter child custody upon affirmative showing by non-custodial parent that custodial parent has abandoned child or become unfit to exercise custody; habeas court does not have authority to maintain continuing jurisdiction in child custody case); Brown v. Gillespie, 465 So. 2d 1046, 1049 (Miss. 1985)(en banc)(stay of execution of judgment for past due child support payments is improper; judgments for past due child support payments are subject to statutory interest charges); Smith v. Todd, 464 So. 2d 1155, 1159 (Miss. 1985)(decree for child custody shall not be changed unless, considering all factors, there has been material change in circumstances which adversely affects children's welfare); Wilson v. Wilson, 464 So. 2d 496, 498 (Miss. 1985)(statute of limitations for recovery of past due child support payments does not begin to run until disability of minority is removed).

[2] Cases involving divorce which came down this past year include: Clements v. Young, 481 So. 2d 263, 271 (Miss. 1985)(party may avoid charge of contempt in divorce action by showing that he is without present ability to pay); Miller v. Fannin, 481 So. 2d 261, 262 (Miss. 1985)(court will generally give effect to choice of law provision in separation agreement); Shelton v. Shelton, 477 So. 2d 1357, 1359 (Miss. 1985)(doctrine of "clean hands" shall be imposed to deny party in divorce suit relief where that party has intimidated witnesses before trial); Massey v. Massey, 475 So. 2d 802, 804 (Miss. 1985)(attorney's fees in divorce decree must be paid directly to spouse for use and benefit of her attorney); Stoker v. Huggins, 471 So. 2d 1228, 1229, 1230 (Miss. 1985)(romantic relationship of custodial parent subsequent to divorce is irrelevant to status of custody unless relationship has adverse effect on child; grandparents have no common law right

of domestics relations,[3] wills and estates,[4] insurance,[5] and a miscellany

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to visitation); Kergosien v. Kergosien, 471 So. 2d 1206, 1210 (Miss. 1985)(to satisfy statutory requirements of cruel and inhuman treatment, offending spouse's misconduct must place other spouse in reasonable apprehension of danger to life, limb, or health); Spearman v. Spearman, 471 So. 2d 1204, 1206 (Miss. 1985)(divorce decree which divests party of title to real property shall be signed and consented to in writing by concerned parties); Sullivan v. Pouncey, 469 So. 2d 1233, 1234 (Miss. 1985)(divorce granted under MISS. CODE ANN. § 93-5-2 (Supp. 1985) on grounds of irreconcilable differences requires property settlement to be incorporated in final decree; prior agreement is not enforceable unless approved by court); Churchill v. Churchill, 467 So. 2d 948, 951 (Miss. 1985)(for wife to maintain claim for separate support and maintenance, her misconduct leading to separation must be less than her husband's misconduct); Watts v. Watts, 466 So. 2d 889, 891 (Miss. 1985)(chancellor may effect equitable division of real property held in husband's name when both spouses jointly contributed to its procurement); Stennis v. Stennis, 464 So. 2d 1161, 1162 (Miss. 1985)(for conduct to constitute cruel and inhuman treatment, cruelty must be more than merely unpleasant or undesirable).

[3] Cases involving other areas of domestic relations not treated textually are: Harris v. King, 480 So. 2d 1131, 1132-33 (Miss. 1985)(chancellor may, within his discretion, receive petition from uninterested party to remove conservator; on appeal, conservator is entitled to supersedeas without bond); Craft v. Craft, 478 So. 2d 258, 262-63 (Miss. 1985)(in action to invalidate separation agreements on grounds of fraud, no fiduciary relationship exists between parties solely by virtue of their previous marriage so as to shift burden to party charged); Pickle v. Pickle, 476 So. 2d 32, 34 (Miss. 1985)(decree of court for money judgment, not constituting either alimony or child support, does not create rights superior to individual's homestead rights); Bumgarner v. Bumgarner, 475 So. 2d 455, 456 (Miss. 1985)(in determining appropriate award of attorneys fees in divorce action, chancellor must follow guidelines established in prior case law); Adams v. Powe, 469 So. 2d 76, 78 (Miss. 1985)(in suit to terminate parental rights, correct standard to apply is that of MISS. CODE ANN. § 93-15-103 (Supp. 1985), and not previously rendered case law); In re I.G., 467 So. 2d 920, 922 (Miss. 1985)(in youth court proceeding, court must inform parties of their statutory right to counsel); Rudder v. Rudder, 467 So. 2d 675, 678 (Miss. 1985)(spouse may not distribute funds acquired during marriage in effort to hinder equitable distribution of property); Adams v. Adams, 467 So. 2d 211, 214, 215 (Miss. 1985)(adoptive parents have duty to support their minor children; subsequent financial modification may be made upon petitioner's showing of material change of position); Gordon v. Wheat, 465 So. 2d 1807, 1808 (Miss. 1985)(in petition for order of filiation and child support, directed verdict will not be granted when ample evidence supports plaintiff's position); Sharplin v. Sharplin, 465 So. 2d 1072, 1073 (Miss. 1985)(decree providing for alimony shall be construed as providing for periodic alimony, unless decree clearly and expressly states otherwise); Powers v. Powers, 465 So. 2d 1036, 1037 (Miss. 1985)(state courts are vested with power to allocate military retirement pay pursuant to divorce decree; court cannot order person to maintain former spouse as irrevocable beneficiary of annuity granted to former military personnel); Alexander v. Alexander, 465 So. 2d 340, 341 (Miss. 1985)(presumption that child born in wedlock is legitimate is rebuttable).

[4] These decisions include: In re Will and Estate of Varvaris, 477 So. 2d 273, 277-78 (Miss. 1985)(if party desires jury to try issue of *devisavit vel non*, he must specifically request jury; to find existence of confidential relationship between two persons, a chancellor must have proof of one person's dependence on the other); In re Guthrie, 475 So.

2d 819, 821 (Miss. 1985)(in will contest, issue of *devisavit vel non* should be decided first by special verdict, with other grounds for contestation to be decided subsequently); Burdette v. Crump, 472 So. 2d 959, 961-62 (Miss. 1985)(MISS. CODE ANN. § 91-1-15 (Supp. 1985) allows natural father to inherit from and through his illegitimate child; there must be explicit finding that father did not refuse or neglect to support child); Miller v. Watson, 467 So. 2d 672, 674 (Miss. 1985)(MISS. CODE ANN. § 91-1-15 (Supp. 1985) provides illegitimates with right to assert heirship); Shriners Hospitals for Crippled Children v. Coltrane, 465 So. 2d 1073, 1076 (Miss. 1985)(will that contained no residuary clause and expressed testatrix's intention to dispose of her entire property will not be altered by her failure to specify each item of that property; Mississippi maintains strong presumption against intestacy).

[6] Cases involving the law of insurance that will not be discussed textually include: National Life and Accident Ins. Co. v. Miller, 484 So. 2d 329, 334-35 (Miss. 1985)(where agents take charge of preparing application for insurance, they cannot seek to avoid liability by claiming insureds signed application; knowledge gained by soliciting agent can be imputed to principal); Southern United Life Ins. Co. v. Caves, 481 So. 2d 764, 767, 769 (Miss. 1985)(knowledge of agent will be imputed to principal in issuance of insurance policy; in majority of cases where summary judgment in favor of insured is proper, jury should hear bad faith claim); Willis v. Mississippi Farm Bureau Mut. Ins. Co., 481 So. 2d 256, 258 (Miss. 1985)(action involving interpretation of insurance policy can be proper for summary disposition); Fullilove v. State Farm Mut. Auto. Ins. Co., 480 So. 2d 522, 524 (Miss. 1985)(copy of insurance policy and any relevant notices of correspondence should be attached to declaration as required by MISS. CODE ANN. § 11-7-47 (1972)); State Farm Mut. Auto. Ins. Co. v. Acosta, 479 So. 2d 1089, 1090, 1091 (Miss. 1985)(in automobile liability insurance policy, insured who is not involved in automobile collision and who has not sustained bodily injury cannot recover uninsured motorist or medical payment benefits in excess of per occurrence clause limitations); Smith v. City of West Point, 475 So. 2d 816, 818 (Miss. 1985)(failure of municipality to properly train its police officers in practice of high speed chase is not covered by "ownership, maintenance or use" clause of liability insurance policy); Overstreet v. Allstate Ins. Co., 474 So. 2d 572, 575-76 (Miss. 1985)(facility of payment clauses in insurance contracts are valid and are to be liberally construed to provide insurer with latitude in good faith payment of proceeds of policy; fact that person is "insured" under insurance policy pursuant to wrongful death statute does "not mean that the amount of benefits payable under the policy" will "be determined under the wrongful death statute"); Matthews v. State Farm Mut. Auto. Ins. Co., 471 So. 2d 1223, 1224 (Miss. 1985)(wife cannot maintain suit against uninsured motorist insurer based upon negligence of husband, even though accident occurred prior to marriage and couple was subsequently divorced); McCoy v. Preferred Risk Ins. Co., 471 So. 2d 396, 398-99 (Miss. 1985)(under Mississippi uninsured motorist law, named insured cannot assign away or claim for himself benefits due another who was also insured person under policy at time he was injured); Talman Fed. Sav. & Loan Ass'n v. American States Ins. Co., 468 So. 2d 868, 873-74 (Miss. 1985)(mortgagee-beneficiary of insurance policy is entitled to recover interest accrued under mortgage instruments as to date of payment, "as well as reasonable attorney's fees," "as specifically provided for in deed of trust"; insurer's liability under contract must be measured by damage at time of loss and not by subsequent fortuitous circumstances benefiting insured but unrelated to insurer); United States Fidelity & Guar. Co. v. Bonner, 467 So. 2d 955, 957 (Miss. 1985)(application of "minor deviation" rule to determine if bailee of automobile deviated from scope of his permission); Briggs v. Benjamin, 467 So. 2d 932, 934

of other topics.[6] Three of the court's decisions regarding the "bad faith" denial by an insurance company of a claim, three concerning uninsured motorist coverage, and one involving an individual's right to privacy and religious freedom will be discussed textually.

I. Recovery of Extra-Contractual Damages for Bad Faith Breach of an Insurance Contract

In *Blue Cross & Blue Shield v. Campbell*,[7] the Mississippi Supreme Court reviewed a lower court's award of punitive damages for breach of an insurance contract constituting the independent tort of "bad faith".[8] William Campbell applied for a non-group insurance policy with Blue Cross on October 2, 1980.[9] In completing the application, Campbell indicated that he had never been treated for alcoholism or an ulcer.[10] Two months after the policy was issued, Campbell made a

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(Miss. 1985)(insurance policy proceeds properly subject to garnishment); Allstate Ins. Co. v. Moulton, 464 So. 2d 507, 510 (Miss. 1985)(insurance company is not required to indemnify or defend insured in malicious prosecution action where policy covers an "occurrence" defined in policy as an "accident").

[6] Decisions concerning topics from various areas of the law include: W.H. Hopper & Assoc's v. DeSoto County, 475 So. 2d 1149, 1152 (Miss. 1985)(in action to recover unpaid taxes local taxing authority has burden of proof); Suggs v. Town of Caledonia, 470 So. 2d 1055, 1057-58 (Miss. 1985)(if town knew of circumstances and failed to act, doctrine of equitable estoppel could be applied against town); Flowers v. Stone County Bd. of Educ., 469 So. 2d 1261, 1261 (Miss. 1985)(public school teachers' right to have decision denying renewal of his contract reviewed is controlled by Miss. Code. Ann. §§ 37-9-101 to -113 (Supp. 1985)); Naron v. Prestage, 469 So. 2d 83, 87 (Miss. 1985)(offer by candidate for election to enter names of voters in cash prize drawing, where voters are not required to vote for sponsoring candidate, is not illegal as gift, bribe, or lottery as defined by statutory law); Great Am. Surplus Lines v. Dawson, 468 So. 2d 87, 90 (Miss. 1985)(conduct of witnesses or jurors involved in suit sufficient to threaten public confidence in fairness of trials will be grounds for mistrial).

[7] 466 So. 2d 833 (Miss. 1985).

[8] The Mississippi Supreme Court recognized in Hood v. Moffett, 109 Miss. 757, 767, 69 So. 664, 666 (1915), that an act constituting the breach of a contract which was so egregious as to amount to the commission of a tort could result in extra-contractual damages. *See also* American Ry. Express Co. v. Bailey, 142 Miss. 622, 631, 107 So. 761, 763 (1926)(punitive damages recoverable for breach of contract attended by willful wrong, insult, or gross negligence amounting to independent tort). In the insurance context, the Mississippi Supreme Court has termed an action filed in response to a breach of a policy by an insurer without an arguable reason to be a "bad faith" cause of action. *Blue Cross*, 466 So. 2d at 842.

[9] *Blue Cross*, 466 So. 2d at 834.

[10] *Id.* Campbell also signed a statement in the application that he would receive no payments during the first year for any infirmity which existed prior to the effective date of the contract. *Id.*

claim under the policy for expenses incurred while a patient at Delta Medical Hospital.[11] After corresponding with Delta Medical, Blue Cross denied the claim determining that the infirmity existed prior to the policy's effective date.[12] Campbell then hired an attorney who forwarded a letter from Campbell's physician to Blue Cross stating that Campbell's condition did not exist prior to the issuance of the policy.[13] Blue Cross agreed to pay the claim, but denied responsibility for expenses incurred beyond those covered by the insurance policy.[14] Campbell thereafter instituted suit against Blue Cross.[15] The Circuit Court of Washington County granted a jury instruction authorizing compensatory damages, and the jury returned a verdict of $10,000.[16] On appeal, the Mississippi Supreme Court, citing *Standard Life Insurance Co. v. Veal*,[17] held that damages beyond the policy coverage were not awardable unless the insurance company had no arguable or legitimate reason to deny the claim.[18] Finding that Blue Cross did not act in "bad faith" in denying the claim, the court reversed the judgment of the circuit court and held for Blue Cross.[19]

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[11] *Id.* Campbell authorized Blue Cross to make payments directly to Delta Medical Hospital. *Id.* The claim form stated that Campbell had been diagnosed as having "acute alcoholic pancreatitis." *Id.*

[12] *Id.* at 835. The hospital records indicated that not only had Campbell been treated in the past for a duodenal ulcer, but that he also had a heavy drinking habit. *Id.* at 834-35.

[13] *Id.* at 836. The doctor who treated Campbell at Delta Medical Hospital was Dr. J.B. Yeldell. When Blue Cross acknowledged receipt of Dr. Yeldell's letter, they stated that their prior denial of Campbell's claim was based on the hospital records and they had no prior knowledge of Dr. Yeldell's opinion. *Id.* at 836-37.

[14] *Id.* at 837. Campbell's attorney demanded payment for additional expenses incurred in the enforcement of the policy in the amount of an additional one-third of the total medical expenses covered. *Id.*.

[15] *Id.* at 838. Blue Cross computed the total expenses covered under the policy to be $10,574.92. *Id.* at 837. Campbell filed suit claiming $25,000 actual damages and $100,000 punitive damages. *Id.* at 838.

[16] *Id.* at 839. The trial judge also submitted five punitive damages instructions to the jury; the jury, however, found for Blue Cross on this issue and made no award of punitive damages. *Id.*

[17] 354 So. 2d 239 (Miss. 1974).

[18] *Blue Cross*, 466 So. 2d at 841. The Mississippi Supreme Court, quoting Reserve Life Ins. Co. v. McGee, 444 So. 2d 803, 809 (Miss. 1983), held that the trial court should determine whether the insurer had the right to deny payment of the money claimed. *Blue Cross*, 466 So. 2d at 841.

[19] *Blue Cross*, 466 So. 2d at 841. The court found that Blue Cross had an arguable reason to originally deny the claim and since Blue Cross later paid Campbell the full amount due under the policy, Campbell had no further cause of action against Blue Cross. *Id.*

On petition for rehearing,[20] Campbell argued that under the majority holding in *Reserve Life Insurance Co. v. McGee*,[21] and in accordance with the guidelines of *Paymaster Oil Mill Co. v. Mitchell*,[22] the determination of whether an insurer is guilty of "bad faith" is always a factual issue for the jury.[23] The Mississippi Supreme Court denied the petition for rehearing, stating that Campbell's argument ignored the fact that in all punitive damages cases the trial judge has the responsibility to view all the evidence and determine whether the facts of a particular case justify submitting the issue of punitive damages to the jury.[24] The court stated that in making this determination the trial judge was not limited by the guidelines of *Paymaster Oil*, but rather must consider the evidence presented by both the plaintiff and defendant to decide if a jury instruction on punitive damages was to be properly granted.[25] The court further held that the guidelines enunciated in *Standard Life Insurance Co. v. Veal*[26] should be utilized by the trial

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[20] *Id.* The opinion of the court on petition for rehearing is consolidated with the court's earlier opinion on the appeal by Blue Cross from the Circuit Court of Washington County. *Id.*

[21] 444 So. 2d 803 (Miss. 1983). The Mississippi Supreme Court formulated a three-step procedure by which to adjudicate a bad faith case in its decision in *Reserve Life*. *Id.* at 809-10. First, the trial court should determine whether the insurer had a reasonably "legitimate or arguable" position for not honoring the claim. *Id.* at 809. If the insurer had such a reason, the trial court should not grant a punitive damages instruction. *Id.* Secondly, if the trial court could not determine, as a matter of law, that the insurer had a reasonable position, the issue should be submitted to the jury. *Id.* Finally, once the trial court determined whether or not a jury question existed with regard to a "legitimate or arguable" reason for denial of the claim, the trial court should decide whether or not there was enough evidence to grant a punitive damages jury instruction. *Id.* at 810. *See generally 1983 Mississippi Supreme Court Review*, 54 MISS. L.J. 45, 153-56 (1984)(overview of *Reserve Life*).

[22] 319 So. 2d 652 (Miss. 1975). The court stated that when a trial judge considers whether the defendant is entitled to a judgment, as a matter of law, he should view the evidence in the light most favorable to the plaintiff and disregard any evidence of the defendant that conflicts with the plaintiff's evidence. *Id.* at 657. The court further stated that it would apply this rule to both the defendant's request for a peremptory instruction and the defendant's request for a judgment n. o. v. *Id.* The *Paymaster Oil* court further clarified its position by stating that the jury decides questions of fact and the trial judge decides matters of law arising from non-conflicting facts. *Id.*

[23] *Blue Cross*, 466 So. 2d at 842.

[24] *Id.* at 841-42. The court held that in any punitive damages case the court was not restricted to considering only one side's evidence. *Id.* at 842.

[25] *Id.* at 842. The court noted that on appeal, it would consider all the evidence to decide if a punitive damages award was properly granted. *Id.* In making this determination, the court noted that it would also not be bound by the stictures of *Paymaster Oil*. *Id.*

[26] 354 So. 2d 239 (Miss. 1974).

court in determining whether the issue of punitive damages should be submitted to the jury.[27] The Mississippi Supreme Court also noted that the determination of whether the insurance company had "an arguably reasonable basis" for denying the claim should be made by the trial judge, whether that determination is legal or factual.[28] If the trial judge finds such a basis to support the insurance company's denial of the claim, then no "bad faith" cause of action exists against the defendant.[29] The court stated that whether or not the trial judge grants a directed verdict to the insured plaintiff on his underlying contract claim will often demonstrate whether an insurance company has an "arguably reasonable basis" to deny the claim.[30] However, the crucial determination remains the "reasonably arguable basis" test and not the grant or refusal of a directed verdict on contract liability.[31] In conclusion the court noted that an award of compensatory damages might be proper in a "bad faith" case, but decided that *Blue Cross* was not the vehicle for ruling upon this issue.[32]

In a lengthy concurrence, Justice Robertson[33] approved what he viewed as the majority's "emasculation" of the court's prior decision in *Reserve Life*,[34] but suggested that the *Blue Cross* opinion does not pro-

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[27] *Blue Cross*, 466 So. 2d at 842. In addition to setting out general law concerning when an award of punitive damages would be justified, the *Standard Life* court had held that an insurance company would not be liable for punitive damages if it had a "legitimate" or "arguable" reason to deny the claim. *Standard Life*, 354 So. 2d at 248. *See generally* Freeland, *Bad Faith Litigation: A Practical Analysis*, 53 MISS. L.J. 237 (1983)(discussion of the development of bad faith litigation in Mississippi).

[28] *Blue Cross*, 466 So. 2d at 842.

[29] *Id.* The court emphasized that a plaintiff seeking punitive damages for the "bad faith" denial of a claim by an insurance company has a heavy burden. *Id.*

[30] *Id.* at 843. The court acknowledged the fact that an insurance company could, "under some contrived or specious" defense, avoid a directed verdict on contract liability, and still not have had an arguable reason to deny the claim. *Id.*

[31] *Id.* at 844. The court suggests that if the trial judge is confronted with one of the rare cases where the plaintiff is not entitled to a directed verdict on contract liability, but a "bad faith" punitive damages instruction is proper, the trial court should first submit the issue of liability to the jury and if the jury finds for the plaintiff then submit the issue of punitive damages utilizing MISS. R. CIV. P. 49(b). *Blue Cross*, 466 So. 2d at 843.

[32] *Blue Cross*, 466 So. 2d at 844-45. The court listed a veritable plethora of Alabama cases which have awarded compensatory damages in "bad faith" suits. *Id.* at 844.

[33] *Id.* at 845 (Robertson, J., concurring). Justice Robertson was joined in his concurrence by Justices Prather and Anderson. *Id.*

[34] *Id.* at 845. Justice Robertson stated that by recognizing that the grant or refusal of a directed verdict to the plaintiff would ordinarily determine whether the bad faith claim goes to the jury, the majority sufficiently disposes of its earlier ruling in *Reserve Life*. *Id.* at 850-51.

vide adequate practical guidelines to decide future "bad faith" claims.[35] Justice Robertson argued that if the trial judge determines that a reasonable jury could find facts supportive of the defendant's position on contract liability, then the same evidence should vindicate the insurance company's determination that it had an arguably reasonable basis to deny the claim.[36]

In *State Farm Fire and Casualty Co. v. Simpson*,[37] the Mississippi Supreme Court further defined the law concerning the award of extra-contractual damages for the "bad faith" breach of an insurance policy.[38] Robert Simpson was issued a homeowner's insurance policy by State Farm covering his dwelling and its contents and providing for additional living expenses.[39] A year after the policy was issued, Simpson and his family returned to the site of his home to discover that the structure had virtually burned to the ground.[40] Following an investigation of the cause of the fire,[41] State Farm denied Simpson's claim for payment under the terms of his homeowner's policy.[42] Subsequently, Simpson filed suit in the Circuit Court of Jackson County seeking actual and punitive damages for "bad faith" breach of the insurance contract.[43] The jury returned a verdict in favor of Simpson awarding compensatory and punitive damages in addition to the amount owed under the policy.[44]

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[35] *Id.* at 844. Justice Robertson's concurrence is in large part a verbatim reiteration of his concurrence in *Reserve Life*. *Id.* at 846.

[36] *Id.* at 351. Justice Robertson noted that this general approach is subject to what he terms the " 'lying' exception." This exception would arise when the issue of liability for the underlying contract is contingent solely upon the truthfulness of the insurance company's witnesses. The exception would apply to prevent the trial judge from making a determination of credibility when confronted with a directed verdict. *Id.*

[37] 477 So. 2d 242 (Miss. 1985).

[38] *Id.* at 243. Chief Justice Patterson authored the majority opinion, joined by the entire court. *Id.*

[39] *Id.* at 244. The entire coverage of the insurance policy amounted to approximately $48,000. This coverage amount was increased by about $3,000 shortly before the fire. *Id.*

[40] *Id.*

[41] *Id.* at 244-45. The local State Farm claims agent hired Systems Engineering Associates of Atlanta, Georgia (SEA) to investigate the scene of the fire. *Id.* SEA prepared a report that indicated that the fire was started by an intentional act with flammable liquid used to accelerate the incineration. *Id.* These findings were confirmed by the state deputy fire marshall. *Id.*

[42] *Id.* at 245. State Farm claimed that the fire was set by an intentional act of the insured, and therefore, coverage was excluded under the policy. *Id.* at 247.

[43] *Id.*

[44] *Id.* at 244. In addition to awarding the plaintiff $22,876.25 as an award due under the policy, the jury awarded $227,123.75 in compensatory damages and $250,000 in punitive damages. *Id.* The judge authorized a remittur of $50,000 for the compensatory

On appeal, State Farm contended that the trial court erred in granting a punitive damages instruction.[45] The court briefly reviewed some of its prior rulings on the award of punitive damages for breach of contract[46] and concluded that the absence of an "arguable reason" by the insurance company in denying a claim does not in itself, necessitate an award of punitive damages.[47] The court distinguished between "ordinary" torts which it defined as those that were the product of "forgetfulness, oversight and the like", and "heightened" torts characterized as "gross, callous or wanton conduct" or "intentional" and "accompanied by fraud or deceit."[48] In perhaps the most perplexing section of the opinion, the court, citing *Paymaster Oil Mill Co. v. Mitchell*,[49] stated that a trial court should determine if an insurer has an arguable reason to deny the claim under the rules "applicable in any other jury trial."[50] Following the guidelines set out in *Paymaster Oil*,[51] this statement could be interpreted to mean that, as an issue of fact, the jury is responsible for determining whether the insurance carrier had an arguable reason to deny the claim.[52] The *State Farm* court, however, seems to be stating that the trial judge determines whether the insurer had an "arguable reason," viewing the evidence in the light most favorable to the plaintiff as *Paymaster Oil* dictates. To determine whether a punitive damage instruction is to be properly granted, the court must consider all the evidence.[53] Finding that State Farm had an arguable reason to deny the claim, the court held that neither punitive

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award. *Id.*

[45] *Id.* at 248.

[46] *Id.* at 248-50. The court discussed cases where the award of punitive damages was acknowledged as a possibility for breach of contract as well as the standard "bad faith" tort cases involving the breach of an insurance policy. *Id.*.

[47] *Id.* at 250. The court noted that insurance companies might lack an "arguable reason" to deny the claim because of an honest mistake or oversight and still not be subject to punitive damages. *Id.*

[48] *Id.* The court further noted that the "ordinary" tort would not reach the "heightened status of an 'independent tort'" as contemplated in a bad faith suit. *Id.* The "heightened" and "independent" tort contemplated by the court is defined by the same conduct that justifies an award for punitive damages. *Id.* This formulation leaves open the question of whether conduct not sufficiently egregious to warrant punitive damages could nevertheless constitute an independent tort. *Id.*

[49] 319 So. 2d 652 (Miss. 1975).

[50] *State Farm*, 477 So. 2d at 252.

[51] *See supra* note 22 and accompanying text.

[52] In Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254 (Miss. 1985) (Robertson, J., dissenting), Justice Robertson makes just this argument. *Id.* at 293-94.

[53] *State Farm*, 477 So. 2d at 252; *Blue Cross*, 466 So. 2d at 842; *see also supra* note 24.

nor compensatory damages were recoverable.[54]

The final case involving a "bad faith" cause of action is the Mississippi Supreme Court's decision in *Bankers Life and Casualty Co. v. Crenshaw*.[55] In this case, Lloyd Crenshaw was injured when his car's alternator fell from his worktable and struck his foot.[56] Crenshaw was hospitalized and subsequently his right leg was amputated below the knee.[57] Crenshaw filed a claim with Bankers Life under his group medical insurance policy.[58] Bankers Life denied coverage under the policy asserting that the hospitalization and subsequent amputation were not due to the injury, but resulted from an infirmity existing prior to the issuance of the policy.[59] Crenshaw brought suit in the Circuit Court of Jackson County, claiming actual contractual damages as well as punitive damages based upon the tort of "bad faith."[60] The jury returned a verdict in favor of Crenshaw and awarded him both actual and punitive damages.[61]

On appeal, the Mississippi Supreme Court reviewed the granting of a punitive damages instruction.[62] Finding that the insurance company had no arguable reason to deny the claim,[63] the court upheld the

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[54] *State Farm*, 477 So. 2d at 252-53. The court further found that the issue of punitive and compensatory damages was so commingled with the issue of actual contractual damages that the jury's award was prejudicially affected. *Id.* at 253. The court therefore remanded this issue for another trial. *Id.*.

[55] 483 So. 2d 254 (Miss. 1985).

[56] *Id.* at 256.

[57] *Id.* at 256-58. Crenshaw was found to have an "ischemic right foot with a necrosis of the distal aspect." *Id.* at 258. The hospital records also indicated that Crenshaw had severe arteriosclerosis of the arteries and a gangrenous condition. *Id.* at 259.

[58] *Id.* at 256. Crenshaw was covered for accidental loss under a group policy which he obtained through his employer. *Id.*

[59] *Id.* at 261. Bankers Life took the position that the injury was caused by severe arteriosclerotic changes in Crenshaw's distal blood vessels and was not caused by an injury occurring "directly and independently of all other causes" as set out in the policy. *Id.* This position was based on the opinion of the medical director of Bankers Life, a physician specializing in general and vascular surgery. *Id.* at 260-61.

[60] *Id.* at 256, 264.

[61] *Id.* at 256.

[62] *Id.* at 268. The court reiterated its previous holding in *Blue Cross* that the trial court must determine if the insurance carrier had an "arguable reason" to deny the claim. *Id.* at 269; *see supra* note 27 and accompanying text.

[63] *Bankers Life*, 483 So. 2d at 271. The court, citing the Fifth Circuit Court of Appeals' interpretation of *Standard Life Ins. Co. v. Veal*, *see supra* note 27 and accompanying text, in Vogel v. Am. Warranty Home Serv. Corp., 695 F.2d 877 (5th Cir. 1983), held the converse of its holding in *Blue Cross*, 466 So. 2d at 842, to be true. The court stated that if a trial court determines that an insurance carrier had no arguable reason to deny a claim, then the issue of punitive damages must be submitted to the jury. *Bankers*

jury verdict.[64]

Justice Robertson dissented from the majority opinion[65] under the rationale that Bankers Life did have an arguable reason to deny the claim.[66] Further, the dissent noted that since the trial court did not grant a directed verdict for the plaintiff on the underlying claim, the majority should have explained why the insurer was not insulated from an award of punitive damages.[67] Justice Robertson also argued that the presence of an arguable reason is a factual issue for the jury to determine under the rule of *Paymaster Oil*.[68]

While the court has stated that a plaintiff must establish conduct justifying punitive damages for the tort of "bad faith" just as in any other tort,[69] the ruling in *Bankers Life* seems to contradict this rule.[70] An articulation by the court of when the tort of bad faith has been established[71] and a clarification of the effect of the presence or absence of an "arguable reason" in both proving the tort and awarding punitive damages would be helpful.

Life, 483 So. 2d at 271.

[64] *Bankers Life*, 483 So. 2d at 279. The jury returned a punitive damages award for $1,600,000. *Id.* at 277. In Part II of the opinion, the Mississippi Supreme Court, reviewing the factors upon which to base an award of punitive damages, found the amount not to be so excessive as to shock the judicial conscience. *Id.* at 277-79.

[65] *Id.* at 282 (Robertson, J., dissenting). Justice Robertson was joined in his dissent by Justices Walker and Prather. *Id.* at 301.

[66] *Id.* at 282-288. Justice Robertson argued that Bankers Life was entitled to rely on the opinion of its medical director in claiming that the amputation was solely caused by Crenshaw's pre-existing condition. *Id.*

[67] *Id.* at 294-96. The dissent noted the language in *Blue Cross* stating that the grant or refusal of a directed verdict would decide the question of punitive damages in the great majority of cases. *Id.* Justice Robertson argued that this general rule requires the majority to explain why the instant case is an exception. *Id.*; *see supra* notes 30-31 and accompanying text.

[68] *Bankers Life*, 483 So. 2d at 293-94 (Robertson, J. dissenting). The dissent argued that under *Paymaster Oil* any contrary rule would violate the parties' right to a trial by jury. *Id.* at 293.

[69] *See supra* note 24-27 and 46-47 and accompanying text.

[70] *Bankers Life*, 483 So. 2d at 271. As Justice Robertson noted in his *Bankers Life* dissent, the absence of an arguable reason does not necessitate the award of punitive damages. *Id.* at 296. The majority's formulation seems to conflict with its prior holding in *State Farm*. *Id.* at 297; *see supra* notes 46-47 and accompanying text.

[71] The court has yet to delineate the elements of the tort of bad faith.

II. UNINSURED MOTORIST COVERAGE

A. *Validity of an Insurer's Oral Promise to Provide Uninsured Motorist Coverage*

In 1985 the Mississippi Supreme Court decided three cases involving uninsured motorist coverage which merit textual discussion. In *Stringer v. Bufkin*,[72] O.V. Stringer sued his insurance agent, Cecil Bufkin, who had allegedly negligently failed to honor Stringer's oral request for uninsured motorist coverage.[73] The Circuit Court of George County dismissed Stringer's suit holding that since Stringer had previously signed a rejection of uninsured motorist coverage, he must, as a matter of law, request the coverage in writing if he subsequently desired it.[74]

On appeal, the Mississippi Supreme Court interpreted MISS. CODE ANN. section 83-11-101 (1972)(amended 1979)[75] to mean that an oral promise by an insurer to provide uninsured motorist coverage is binding even in the absence of a written request by an insured who has previously expressly rejected the coverage.[76]

B. *Recovery of Punitive Damages Under the Uninsured Motorist Act*

In *State Farm Mutual Automobile Insurance Co. v. Daughdrill*,[77]

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[72] 465 So. 2d 331 (Miss. 1985).

[73] *Id.* at 332. Stringer testified that he had signed a written rejection of uninsured motorist coverage in 1969, but that in 1973, without signing a revocation of that rejection, Bufkin orally promised to extend to him uninsured motorist coverage. *Id.* Bufkin denied Stringer's claims. *Id.*

[74] *Id.* MISS. CODE ANN. § 83-11-101 (Supp. 1985) sets forth the following requirement with regard to uninsured motorist coverage:

> The coverage herein required shall not be applicable where any insured named in the policy shall reject the coverage in writing and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in any renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

Id.

[75] This statute requires automobile insurance policies to contain uninsured motorist provisions with certain express exceptions. MISS. CODE ANN. § 83-11-101 (Supp. 1985); *see supra* note 74.

[76] *Stringer*, 465 So. 2d at 334. The court interpreted the pertinent statute to mean that while an insurer is not required to provide uninsured motorist coverage without a written revocation of the insured's previous rejection, the statute does not prohibit the insurer from issuing such a policy. *Id.*

[77] 474 So. 2d 1048 (Miss. 1985).

Helen Daughdrill, while driving her automobile, was struck from the rear by Audie Hacker, an uninsured motorist.[78] Daughdrill suffered bodily injury and property damage.[79] Upon Daughdrill's demand for payment of actual and punitive damages, State Farm filed a declaratory judgment action in the United States District Court for the Southern District of Mississippi to obtain a determination of whether Mississippi's Uninsured Motorist Act[80] allowed recovery of punitive damages, and if so, whether the insurer must pay any punitive damages assessed.[81] The United States Court of Appeals for the Fifth Circuit certified the case to the Mississippi Supreme Court.[82]

The Mississippi Supreme court noted that the legislature specifically stated in the Uninsured Motorist Act that the insurer shall pay all sums that arise from bodily injury, death, and property damage, and concluded that it was the intent of the legislature to exclude punitive damages.[83] Moreover, the court reasoned that since the purpose of punitive damages is to punish the tortfeasor and deter future occurances of similar action, then that purpose would not be accomplished in an uninsured motorist context.[84] Accordingly, the court answered both certified questions in the negative.[85]

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[78] *Id.* at 1049-50. Hacker was subsequently found to have been intoxicated at the time of the accident and driving without a valid driver's license. *Id.* at 1050.

[79] *Id.* at 1050.

[80] Mississippi's Uninsured Motorist Act can be found at MISS. CODE ANN. § 83-11-101, et seq. (Supp. 1985).

[81] *Daughdrill*, 474 So. 2d at 1050. The district court found punitive damages to be recoverable under Mississippi's Uninsured Motorist Act. *Id.*

[82] *Id.* at 1049. Pursuant to Mississippi Supreme Court Rule 46, the Fifth Circuit certified the following questions:

> (1) Does the Uninsured Motorist Act [MISS. CODE ANN. §§ 83-11-101, et seq. (Supp. 1982)] require that the uninsured motorist coverage provision of an automobile liability policy cover punitive damages that the insured would be legally entitled to collect from the uninsured motorist?
>
> (2) Does the uninsured motorist endorsement of the subject policy require that the insurer pay any punitive damages assessed against the uninsured motorist, not to exceed the aggregated policy limits of coverage?

Daughdrill, 474 So. 2d at 1049.

[83] *Daughdrill*, 474 So. 2d at 1051. The court reasoned that since the legislature had recently broadened the coverage of the Uninsured Motorist Act by providing for recovery for property damage, and had not specifically included punitive damages, then it must have intended to restrict the Act to the damages expressly provided. *Id.*

[84] *Id.* at 1052. The court reasoned that the tortfeasor himself is not punished and the insurer cannot deter the same future action of others. *Id.*

[85] *Id.* at 1054.

C. *Offset Allowed by Underinsurance Provision of Uninsured Motorist Act*

In *State Farm Mutual Automobile Insurance Co. v. Kuehling*,[86] Susan Kuehling sued both the driver and owner of an automobile, as well as her own uninsured motorist carrier, State Farm, for damages she incurred in an automobile accident.[87] On a summary judgment motion, the Circuit Court of Harrison County held that the insured was entitled to receive the total coverage limits afforded by her uninsured motorist coverage, plus amounts received from the tortfeasor's liability carrier, without offset.[88]

On appeal, the Mississippi Supreme Court held that the provision of the Mississippi Uninsured Motorist Act concerning uninsured motorist coverage[89] does not prohibit an insurance policy from requiring an offset by any amount allowed to the tort victim by the tortfeasor's insurance coverage.[90]

III. Recognition of State Constitutional and Common-Law Right to Privacy

The Mississippi Supreme Court in *In re Brown*[91] ruled upon the rights of privacy and religious freedom of the individual. Mattie Brown was shot and seriously wounded.[92] She was immediately taken to the hospital where the attending physician recommended blood transfu-

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[86] 475 So. 2d 1159 (Miss. 1985).

[87] *Id.* at 1160. The driver of the car was covered by a personal insurance policy of $10,000. The owner of the vehicle was uninsured. Kuehling had coverage totalling $20,000 for separate liability policies both issued by State Farm. Kuehling maintained that she was entitled to a $20,000 payment from State Farm together with the tortfeasor's payment of $10,000 under the Mississippi Uninsured Motorist Act, despite the fact that the insurance policy expressly entitled the insurance company to an offset. *Id.* at 1160-61.

[88] *Id.* at 1160.

[89] This statutory provision is codified at Miss. Code Ann. § 83-11-103(c)(iii)(Supp. 1985), and provides for coverage when the tortfeasor carries coverage which is less than the coverage limits applicable to the injured party under his uninsured motorist coverage. *Kuehling*, 475 So. 2d at 1162. *See generally*, Phillips, *A Guide to Uninsured Motorist Insurance Law in Mississippi*, 52 Miss. L.J. 255, 277-80 (1982)(discussion of underinsured motorist coverage in Mississippi).

[90] *Kuehling*, 475 So. 2d at 1163. The court reasoned that a contrary rule which would allow an insured party to recover a greater amount from a tortfeasor who is partially insured, rather than one who is completely uninsured, is not required by the Act. *Id.* at 1162.

[91] 478 So. 2d 1033 (Miss. 1985).

[92] *Id.* at 1035.

sions during surgery.[93] Brown objected to the transfusions on religious grounds.[94] Because Brown was the sole eyewitness in the murder prosecution against her daughter, the Chancery Court of Hinds County granted an order requiring that Brown receive the blood transfusions.[95]

On appeal to the Mississippi Supreme Court, Brown asserted a claim to two rights—a right of free exercise of religious beliefs and a right of privacy.[96] Considering Brown's claim of right to religious freedom, the court traced the history of the right[97] and stated that where the religiously grounded action is a refusal to act rather than affirmative conduct, the state's authority to interfere is "virtually non-existent" except in the instance of "grave and immediate" public danger.[98] Finding that Brown's exercise of her right was not entailed by any "compelling considerations of public safety and danger," the court held that this right to free exercise of religion prevailed over the state's interest.[99]

The Court further held that Brown had a right to privacy which could not be infringed upon.[100] While the court traced the origin of the federal constitutional right to privacy,[101] the court stated that its decision was grounded independently in the common law of Mississippi[102] and in the Mississippi Constitution of 1890.[103] Finding no great and

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[93] *Id.*

[94] *Id.* Brown is a Jehovah's Witness. *Id.* The interpretation espoused by her religion of certain Bible verses forbids her from accepting blood transfusions. *Id.* at 1038.

[95] *Id.* at 1035-36. The district attorney applied for the order to minimize the risks of losing a key witness in his prosecution of Brown's daughter. *Id.* at 1035. Although following issuance of the order Brown received the blood transfusions, she maintained that the case was not moot since she would require additional surgery. *Id.* at 1036.

[96] *Id.* at 1036.

[97] *Id.* at 1037-38. The court cited numerous cases in the jurisprudence of the first amendment to the United States Constitution. *Id.*

[98] *Id.* at 1037.

[99] *Id.* at 1038. Noting that the right to the freedom of religion is of both federal and state constitutional dimensions, the court stated that its decision was based independently upon MISS. CONST. art. 3 § 18. *In re Brown*, 478 So. 2d at 1039 n.5.

[100] *In re Brown*, 478 So. 2d at 1040.

[101] *Id.* at 1039-40. The court noted the recognition by the United States Supreme Court of a broad right to privacy which includes the right to make certain personal decisions. *Id.* at 1039.

[102] *Id.* at 1039-40. The court found that this right has been manifested in the doctrine of informed consent by respecting an individual's right to be free of bodily intrusion. *Id.* at 1040. The court further noted that Deaton v. Delta Democrat Publishers Co., 326 So. 2d 471, 473 (Miss. 1976), recognized a common law right to privacy. *In re Brown*, 478 So. 2d at 1039-40.

[103] *In re Brown*, 478 So. 2d at 1040 n.7. The court cited MISS. CONST. art. 3, § 32 which states: "The enumeration of rights in this constitution shall not be construed to

imminent public danger which would override Brown's right, the court vacated the order of the chancery court.[104]

While defining an individual's right to privacy has traditionally been the province of the United States Supreme Court, the Mississippi Supreme Court with *In re Brown* has begun to shape the contours of our state right to privacy. This recognition of an independent state constitutional right to privacy is significant because a decision of a state court resting on "adequate and independent" state grounds is not subject to review by the United States Supreme Court.[105] Further, a state court can interpret its state constitution to provide for greater individual rights and protections than the United States Supreme Court has granted under the Federal Constitution.[106] For example, if the state legislature were to pass a law restricting the availability of abortion to minors which passed federal constitutional requirements, the state supreme court would be free to strike down the law as violative of our state constitutional right to privacy. This decision would not be subject to review by the United States Supreme Court.[107] For these reasons, the right to privacy announced in the instant decision could become a source of much future litigation.

Michael Gwin

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deny and impair others retained by, and inherent in, the people." *Id.*

[104] *In re Brown*, 478 So. 2d at 1040, 1042.

[105] Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

[106] *See, e.g.*, Michigan v. Moseley, 423 U.S. 96, 120 (1975)(state has power to impose higher standards than are required by the federal constitution); Lego v. Twomey, 404 U.S. 477, 489 (1972)(states are free to adopt a higher constitutional standard); Cooper v. California, 386 U.S. 58, 62 (1967)(same).

[107] *See supra* note 105 and accompanying text.

PROPERTY

During 1985, the Mississippi Supreme Court rendered numerous, unremarkable decisions involving different areas of property law which included deeds,[1] leases, [2] bond issues,[3] contracts,[4] annexation,[5] eject-

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[1] Vinson v. Meridian Masonic Temple Bldg. Ass'n, 475 So. 2d 807, 809 (Miss. 1985)(successor in title liable only for breach of warranty deed covenants resulting in damage which occurred during his occupancy); Chapman v. Chapman, 473 So. 2d 467, 469, 471 (Miss. 1985)(delivery of deed to agent of grantor does not constitute delivery of deed to grantee; grantor equitably estopped from denying misleading representation although grantor lacked subjective intent to mislead); Castle v. Harkins & Co., 464 So. 2d 513, 515-16 (Miss. 1985)(language of deed construed most strongly against grantor of deed who knew he owned, reserved, and granted specific fractional interest in minerals).

[2] Red Gate Corp. v. Ladner, 480 So. 2d 1147, 1149 (Miss. 1985)(if lease requires either performance or cash equivalent to performance, impossibility of performance caused by third party does not extinguish obligation to pay cash equivalent); Hathorn v. Amoco Prod. Co., 472 So. 2d 403, 407-08 (Miss. 1985)(remainderman has present interest in minerals on property and may validly lease that interest; however, both remainderman and life tenant must consent to removal of mineral resources from property); Culbertson v. Dixie Oil Co., 467 So. 2d 952, 954-55 (Miss. 1985)(court decree does not constitute res judicata on question of validity of leases held by other parties when decree expressly provides that it has no effect on rights of other parties; complainant in suit to remove cloud from title has burden of proving title and may not rely on weakness of adversary's title); Gardner v. Jones, 464 So. 2d 1144, 1149-50 (Miss. 1985)(absent malicious or fraudulent intent by lessor, punitive damages denied in case involving misrepresentation of zoning and land-use restrictions).

[3] White v. Gautier Util. Dist. of Jackson County, 465 So. 2d 1003, 1008, 1012-13 (Miss. 1985)(financing local improvements via bond issues is legislative function that cannot be challenged on due process grounds requiring notice and opportunity to be heard, but due process allows challenge of accuracy and proportionality of any tax assessment; subsequent to validation decree of bond issue, taxpayers have no due process right involving any facet of bond issue or project if scope of validation proceeding provided adequate forum for presentation of issues in controversy; local utility district may be organized and exist under local and private law in presence of general law if local and private act furthers same overall purposes and policies as general act and if differences between acts are primarily procedural or otherwise minor).

[4] Busching v. Griffin, 465 So. 2d 1037, 1042 (Miss. 1985)(motion to dismiss inappropriate when breach of substantially ambiguous option contract for purchase of land is subject of controversy).

[5] Western Line Consol. School Dist. v. City of Greenville, 465 So. 2d 1057, 1060-61 (Miss. 1985) (clarification of original opinion)(chancery court has constitutionally permissible jurisdiction in annexation cases because judicial review in such cases is equitable in nature; parties are entitled to a judicial determination of reasonableness of proposed municipal annexation).

[6] Hudson v. Bank of Edwards, 469 So. 2d 1234, 1238-39 (Miss. 1985)(summary judg-

ment, [6] foreclosure,[7] eminent domain,[8] adverse possession,[9] insurance,[10] constructive trust,[11] partition,[12] power of attorney,[13] municipalities,[14]

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ment is error in ejectment action involving property sold at foreclosure sale where issue of fact exists as to propriety of foreclosure sale).

[7] Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461, 465-66 (Miss. 1985)(statutorily and constitutionally valid foreclosure sale under deed of trust not set aside absent evidence of bad faith on part of trustee; inadequacy of price insufficient to invalidate sale unless consideration is so grossly inadequate as to shock conscience of court; mortgagee must prove entitlement to deficiency judgment under principles of equity which require more than a mere showing of difference in price paid at foreclosure and amount of indebtedness); Southern Land & Resources Co. v. Dobbs, 467 So. 2d 652, 655, 657 (Miss. 1985)(six-year statute of limitations applicable in action for wrongful or fraudulent foreclosure; decree granting injunction does not collaterally estop an action at law for past damages if damages were not sought as incident to injunction).

[8] Runge v. Necaise Const. Co., 467 So. 2d 666, 668-69 (Miss. 1985)(complaint alleging taking of private property in violation of MISS. CONST. art. III, § 17 may be filed in chancery court without petitioners first filing claim with county board of supervisors as required under MISS. CODE ANN. § 65-7-61 (1972)); Trustees of Wade Baptist Church v. Mississippi State Highway Comm'n, 469 So. 2d 1241, 1245 (Miss. 1985)(access and parking are not attributes or capabilities of land subject to individual appraisals, but are considerations in eminent domain proceedings only as they affect property value subsequent to the taking); City of Jackson v. McAllister, 475 So. 2d 432, 433-34 (Miss. 1985)(doctrine of res judicata inapplicable to legislative acts; reopening of previously closed street must be done through process of eminent domain rather than through use of ordinance rescinding order closing street).

[9] Johnson v. Black, 480 So. 2d 519, 521 (Miss. 1985)(order of trial court dissolving injunction and restoring possession of real property was factual determination; appeal of judgment was subject to MISS. CODE ANN. § 11-3-23 (Supp. 1984), which required imposition of 15% penalty against appellant on affirmance of judgment); Johnson v. Black, 469 So. 2d 88, 90, 91 (Miss. 1985)(test for reviewing findings of fact in adverse possession case is one of substantial evidence/manifest error; permissive use alone is insufficient to support claim of ownership of property by adverse possession); Davis v. Clement, 468 So. 2d 58, 62-63 (Miss. 1985)(sporadic and imprecise acts of possession by adverse possessor insufficient to support claim of ownership over disputed acreage).

[10] Talman Fed. Sav. & Loan Ass'n v. American States Ins. Co., 468 So. 2d 868, 873-74 (Miss. 1985)(mortgagee-beneficiary of insurance policy is entitled to recover interest accrued under mortgage instruments up to date of payment, as well as reasonable attorney's fees specifically provided for in deed of trust; insurer's liability under contract must be measured by damage at time of loss and not by subsequent fortuitous circumstances benefitting insured but unrelated to insurer).

[11] Allgood v. Allgood, 473 So. 2d 416, 421-22 (Miss. 1985)(constructive trust may be established by parol testimony notwithstanding statute of frauds; evidence must show substantial overreaching or fraud and must be clear and convincing; creation of constructive trust upheld where legal title was vested in trustee but evidence was uncontradicted that beneficiary had paid for property).

[12] Daughtrey v. Daughtrey, 474 So. 2d 598, 601-03 (Miss. 1985)(right to partition is statutory and not dependent on common law or equity; possession or right of possession in tenants in common gives absolute and unconditional right to partition, however incon-

and sixteenth section land.[15]

Although 1985 was essentially a quiet year for property law in Mississippi, the supreme court did decide two cases worthy of textual commentary: first, *Miller v. Lowery*,[16] in which the court found that certain mineral interests had been deeded to a subsequent grantee despite the claim of a prior grantor that she had reserved the mineral interest from her grant by use of apt words;[17] and second *Fourth Davis Island Land Co. v. Parker*,[18] which established "reasonable necessity" as the burden of proof for a quasi-easement and further provided a restrictive test for determining "reasonable necessity."[19]

I. Reservation of Mineral Rights by Grantor

In *Miller v. Lowery*,[20] the Mississippi Supreme Court held that where a deed states that land is conveyed "subject to the reservation of all oil, gas and other minerals . . . by prior grantors," the "subject to" language does not operate to reserve the mineral estate in the grantor absent an actual prior reservation or exception.[21]

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venient to parties; defense of hardship unavailable in partition action; chancellor cannot, merely by judicial fiat or decree, divest property out of husband and invest same property in wife by permitting wife to purchase homestead property under affordable terms).

[13] Kountouris v. Varvaris, 476 So. 2d 599, 603-04, 606-07 (Miss. 1985)(power of attorney, improperly acknowledged and not recorded, does not empower attorney-in-fact to convey interests in land situated in Mississippi prior in right to interests of subsequent bona-fide purchasers or judgment lien creditors; written agreement may convey power of attorney sufficient under Mississippi law to empower attorney-in-fact to handle principal's personal property in this state and to enter valid and enforceable contracts on his behalf but in order to convey interest in real property, power must be properly acknowledged and recorded; choice of law issue must be answered before determining whether power of attorney is valid and actions taken by attorney-in-fact are enforceable with regard to land situated outside of Mississippi).

[14] Coastal States Ltd. v. City of Gulfport, 480 So. 2d 1113, 1115-16 (Miss. 1985)(surveyor, acting on behalf of city, established half section line with reasonable accuracy using procedures approved in Riley v. Richardson, 267 So. 2d 901 (Miss. 1972), and despite contrary evidence, jury verdict in favor of this survey will not be reversed).

[15] Turney v. Marion County Bd. of Educ., 481 So. 2d 770, 776 (Miss. 1985)(board of education requirement that lessee of sixteenth section lands sign lease was within management powers of board as trustee and within authority of board under Miss. Code Ann. § 29-3-1(1)(Supp. 1984)).

[16] 468 So. 2d 865 (Miss. 1985).

[17] *Id.* at 866.

[18] 469 So. 2d 516 (Miss. 1985).

[19] *Id.* at 521.

[20] *See supra* notes 16, 17 and accompanying text.

[21] *Miller*, 468 So. 2d at 867. The supreme court briefly labeled the clause a "subject to" clause and stated that the court would be overreaching if it determined that "subject

Sarah Miller,[22] conveyed fee simple title by warranty deed which included the above quoted language.[23] No prior grantors had made any reservation of mineral interests.[24] Nevertheless, Miller asserted that she had intended to sever, and thus retain, the mineral rights in the land by the "subject to" clause.[25] Ultimately, the land was conveyed to the Lowerys by warranty deed.[26] The Chancery Court of Lamar County held that the "subject to" language was intended only to limit Miller's warranty in the transfer instruments rather than to operate as a severance of the mineral estate.[27]

The Mississippi Supreme Court, affirming the chancery court decree, ruled that when a deed states that land is conveyed subject to a prior reservation of a mineral interest, the "subject to" language must be coupled with an actual prior reservation or exception in order to effect a severance of the mineral rights from the property.[28] Although the court's decision may have reflected the true intentions of the parties, it failed to adequately distinguish prior case law and, at times, seemed to completely misinterpret certain prior decisions. The court distinguished the instant case from three cases upon which the grantor, Miller, had relied to advance her claim.[29] First, Miller had relied on the

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to" language, standing alone, operated the same as "subject to" language accompanied by an existing prior exception or reservation as had been asserted in Ewing, *Reservation and Exception of Minerals in Mississippi Conveyencing*, 39 MISS. L.J. 39, 41 (1967). *Miller*, 468 So. 2d at 867.

The *Ewing* article, stating that the words "subject to", standing alone, are apt words in creating a valid reservation or exception, cited *Wilson v. Gerard*, a case in which the prior conveyance was made to a fictitious person. Ewing, *Reservation and Exception of Minerals in Mississippi Conveyancing*, 39 MISS. L.J. 39, 43 (citing Wilson v. Gerard, 213 Miss. 177, 187, 56 So. 2d 471, 473-74 (1952)); *see infra* text accompanying notes 35-40.

[22] Miller possessed fee simple title to both surface and mineral estates in the land located in Lamar County. *Miller*, 468 So. 2d at 866.

[23] *Id.* Later, Miller gave her grantees a quit claim deed, the language of which is not disclosed or discussed in the case record. *Id.*

[24] *Id.*

[25] *Id.* Miller's immediate grantees offered corroborative testimony as to Miller's intent. *Id.*

[26] *Id.* The deed stated: "This conveyance is made subject to prior reservation of all the oil, gas and other minerals in, on, and under the above described property." *Id.* The Lowerys, remote grantees of Miller, stated that they did not ask about mineral rights when they purchased the property. *Id.* However, the Lowerys emphasized that they acquried all the property rights possessed by their immediate grantors. *Id.*

[27] *Id.* Accordingly, the chancellor invalidated, as clouds on the Lowery title, a lease and two royalty deeds executed by Miller. *Id.* The chancellor consequently upheld a lease of the mineral rights effected by the Lowerys. *Id.*

[28] *Id.* at 867; *see supra* note 21 and accompanying text.

[29] *Miller*, 468 So. 2d at 866-67. Cases distinguished were Pfisterer v. Noble, 320 So.

case of *Oldham v. Fortner*[30] for the proposition that if a deed excepts or reserves property stated in the deed as having been previously sold and conveyed, then the exception or reservation is valid, although the recital of sale and conveyance is false.[31] In *Oldham*, the "excep[tion of] all minerals and mineral rights . . . heretofore sold and conveyed" in land was effective, even though the prior mineral deed, purportedly selling and conveying the mineral interest, was void.[32] The *Miller* court, justifying the severance of the mineral estate in *Oldham*, reasoned that "the clause complained of in *Oldham* used the language 'excepting' rather than 'subject to' [as in *Miller*]."[33] However, the *Miller* court failed to address the *Oldham* court's finding that "a valid exception may be made of such portion of the grantor's land as has been previously sold or conveyed as where the deed is made *subject to* the conditions and provisions of a prior conveyance." (emphasis added)[34] From this statement it would seem that the *Oldham* court would have accepted the "subject to" clause as a means of creating a valid exception had it been called on to do so.

The second case relied on by Miller was *Wilson v. Gerard*,[35] the precedential decision cited by *Oldham* for the general proposition that

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2d 383 (Miss. 1975); Oldham v. Fortner, 221 Miss. 732, 74 So. 2d 824 (1954); and Wilson v. Gerard, 213 Miss. 177, 56 So. 2d 471 (1952).

[30] 221 Miss. 732, 74 So. 2d 824 (1954).

[31] *Miller*, 468 So. 2d at 866 (citing Oldham v. Fortner, 221 Miss. 732, 74 So. 2d 824 (1954)). In *Oldham*, the grantor conveyed, by a mineral right and royalty transfer deed, "an undivided ____ (____) interest in. . .all of the oil, gas, and other minerals. . . ." in specifically described land. *Oldham*, 221 Miss. at 736, 74 So. 2d at 825. Later, the grantor deeded the land itself to a third party, excepting "all minerals and mineral rights heretofore sold and conveyed. . ." in the land. *Id.* at 736, 74 So. 2d at 825. The chancellor held void the "reservation" in the second deed because the first deed, failing to describe the interest conveyed, was void. *Id.* at 739, 74 So. 2d at 827. The Mississippi Supreme Court reversed, stating the legality of the "exception" did not depend upon the legality of the first instrument. *Id.* at 740, 74 So. 2d at 827.

[32] *Oldham*, 221 Miss. at 743, 74 So. 2d at 829.

[33] *Miller*, 468 So. 2d at 866-67; *see supra* note 31 and accompanying text.

Outside of this jurisdiction, some other courts have also found that "subject to" clauses only protect the grantors from breach of warranty. *See, e.g.*, Murray v. United States, 291 F.2d 161, 162 (8th Cir. 1961)("subject to" clause for purpose of protecting grantor's warranty only); Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 43 So. 2d 782, 787 (1949)(lack of "subject to" language showed no intent of grantor to reserve minerals). *But see, e.g.*, Union Oil Co. v. Colglazier, 360 So. 2d 965, 967-68 (Ala. 1978)("subject to" clause expresses intent to reserve stated interest unless another deed incorporated by reference); Kelley v. Haas, 262 S.W.2d 687, 689 (Ky. 1953)("subject to" clause effective to reserve mineral interest with grantor).

[34] *Oldham*, 221 Miss. at 741, 74 So. 2d at 827-28.

[35] 213 Miss. 177, 56 So. 2d 471 (1952).

an exception is valid as to the property stated as having been previously sold or conveyed, even though the recital of the sale or conveyance is false.[36] In *Wilson*, the deed was made "[s]ubject to one-half interest in mineral and oil rights as conveyed to William Henderson," a fictitious person.[37] The court in *Wilson* reasoned that a one-half interest remained in the grantors, even though the recital was false, because the grantee received the same interest he would have received had the representation been true.[38] Rather than explicitly distinguishing *Wilson* on the basis of grantee expectations, *Miller* stated that *Wilson* dealt with a specific exception.[39] Furthermore, the *Miller* court failed to discuss how the *Wilson* decision would be affected by its proclamation that a "subject to" clause is not, nor has it ever been, sufficient to reserve minerals without a formal mineral severence. It was precisely that argument that the grantee in *Wilson* raised when he claimed the prior grant was void because the grantee was fictitious.[40]

Pfisterer v. Noble,[41] the third case cited by Miller, held that a clause, stating "[t]his conveyance and warranty . . . are made subject to prior reservations and conveyances of all of the oil, gas and other minerals," excepted all minerals, including the minerals vested in the grantors at the time of conveyance.[42]

The *Pfisterer* court, as noted in the *Miller* decision, rested its decision on the principles of the "four corners" doctrine, a doctrine that requires that the intent of the parties be ascertained from within the

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[36] *Oldham*, 221 Miss. at 743, 74 So. 2d at 828 (citing Wilson v. Gerard, 213 Miss. 177, 188, 56 So. 2d 471, 472 (1952)).

[37] *Wilson*, 213 Miss. at 182, 56 So. 2d at 471.

[38] *Id.* at 186, 56 So. 2d at 473.

[39] *Miller*, 468 So. 2d at 867. The *Wilson* court had looked to the grantee's allegation of misrepresentation to find the grantee's expectation in the bargain. The court interpreted this allegation to be an admission by the grantee that he understood that he was only receiving a one-half interest. *Wilson*, 213 Miss. at 186, 56 So. 2d at 473.

The *Miller* court found the specific reservation in *Wilson* to be factually distinguishable but it did not consider grantee expectations. *Miller*, 468 So. 2d at 867.

[40] *Wilson*, 213 Miss. at 183, 56 So. 2d at 472. The grantee in *Wilson* argued that because William Henderson was fictitious, the grant to him was void for lack of a grantee *in esse*. *Id.*, 56 So. 2d at 472. Because the grant was void, the grantee claimed the minerals became vested in him at the time of the conveyance. *Id.*, 56 So. 2d at 472. The *Wilson* court agreed that if William Henderson was fictitious, the grant to him was void. *Id.*, 56 So. 2d at 472. If the grant to Henderson was void, could there have been a formal mineral severance?

[41] 320 So. 2d 383 (Miss. 1975).

[42] *Pfisterer*, 320 So. 2d at 384. At the time of transfer, the grantors in *Pfisterer* owned a one-eighth interest in mineral rights. *Id.* at 383. The grantors had previously sold all their mineral interests but had repurchased a one-eighth interest. *Id.*

instrument itself unless the instrument is ambiguous.[43] Reference to facts outside the deed therefore being unnecessary, such as whether there had been any prior conveyances, the *Pfisterer* court found that the language of this "subject to" clause effected a valid reservation and could not be interpreted as a mere limitation of warranty "as might be the case had it simply stated the warranty was subject to prior reservations."[44] Thus, it would seem to follow that an almost identical "subject to" clause would also express the necessary intent to make a reservation.[45] However, the *Miller* court found just the opposite and distinguished itself on the basis of the extrinsic evidence that the *Pfisterer* court had apparently not considered.[46] In fact, the effect of the *Miller* decision would seem to render a "subject to" clause ambiguous as a matter of law, always requiring that the chancellor ascertain whether or not prior reservations were made in order to determine the effectiveness of the "subject to" clause as a reservation or exception.[47]

In *Richardson v. Moore*,[48] a case not mentioned by *Miller*, the Mississippi Supreme Court held that a warranty deed "reserving the oil and mineral rights . . . in accordance with a deed" which conveyed land "subject to mineral and oil rights . . . not owned by the grantors" failed to retain the mineral estate in the grantor.[49] As in *Miller*, no reservation or exception had been made by prior grantors in *Richard-*

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[43] *Id.* at 384; *see Miller*, 468 So. 2d at 867 (recognizing *Pfisterer* as relying on "four corners" doctrine).

[44] *Pfisterer*, 320 So. 2d at 384. In *Pfisterer*, the court reasoned that the language of the deed was not ambiguous because the language "significantly and clearly" accomplished two things: a conveyance and a warranty, and made both "subject to prior reservations and conveyances of all oil, gas and other minerals." *Id.*

[45] The *Miller* court recognized that the "subject to" clause with which it dealt was very similar to the clause the *Pfisterer* court interpreted. *Miller*, 468 So. 2d at 867.

[46] *Id.* The *Miller* court found that the actual prior conveyance of all the mineral rights in *Pfisterer* made the cases factually distinguishable. *Id.* It did so in spite of its own recognition that the *Pfisterer* court had looked solely to the language of the deed.

[47] *Id.* The *Miller* court's requirement that there be a prior formal mineral severance makes it mandatory that one look beyond the deed or instrument to determine if there has, in fact, been a formal severance. *Id.* However, to conclude that the "subject to" clause is ambiguous as a matter of law would most likely be inappropriate since the court opted to distinguish *Pfisterer* rather than overrule it. *See id.* (*Pfisterer* distinguished).

[48] 198 Miss. 741, 22 So. 2d 494 (1945).

[49] *Id.* at 750-52, 22 So. 2d at 495-96. In *Richardson* the second deed stated: "The fee herein is subject to mineral and oil rights, if any, now of record and not owned by the grantors herein . . . ." *Id.* at 749, 22 So. 2d at 495. The grantors executed the second deed to the grantee Hoskins-Moore Lumber Company twelve days after the grantor lumber company executed the first deed which made reservations "in accordance with" the second deed. *Id.* at 750, 22 So. 2d at 495.

son, and thus, the grantor of the warranty deed, which was made in accordance with the other deed, owned all the mineral rights at the time of the conveyance.[50] The *Richardson* court, however, did not base its holding primarily upon the fact that there were no prior reservations or exceptions.[51] Rather, *Richardson* stressed the factual determination that the grantees of the first deed, who were the grantors of the second deed, did not know what, if any, mineral exception was in the second deed through which they claimed title.[52] The *Richardson* court, finding the deed ambiguous, looked at the surrounding circumstances, giving "much weight" to the actions of the parties in determining their intent and the meaning of the deeds.[53]

Perhaps the Mississippi Supreme Court in *Miller*, following its own lead in *Richardson*, should have found the language in the deed ambiguous.[54] The determination of the intent of the parties at the time of conveyance seems particularly appropriate in light of the surrounding judicial decisions, as well as the circumstances. First, the language, conveying land "subject to the reservation of . . . all . . . minerals . . . by prior grantors," could be interpreted under *Oldham* as a reservation of all property interests stated as having been previously sold by prior grantors, even though the recital of the reservation of such interests by previous grantors was false.[55] Further, difficulty lies in distinguishing between a reservation to a fictitious person, as in *Wilson*, and a reservation made by non-existent grantors.[56] Moreover, as in *Pfisterer*, the absence of words of warranty could suggest that the "subject to" clause did not operate as a mere limitation of warranty.[57] Finally, like the

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[50] *Id.* at 751, 22 So. 2d at 496; *see supra* text accompanying note 24.

[51] *Richardson*, 198 Miss. at 751-52, 22 So. 2d at 496. The court in *Richardson* did note that the second deed did not actually except any mineral interests because all rights were owned by the grantors. *Id.* at 751-52, 22 So. 2d at 496; *see* Ewing, *supra* note 21, at 47.

[52] *Richardson*, 198 Miss. at 750, 22 So. 2d at 495-496; *see* Ewing, *supra* note 21, at 47 (explaining *Richardson*).

[53] *Richardson*, 198 Miss. at 751-52, 22 So. 2d at 496. The fact that no actual exception or reservation existed was insufficient to determine whether the first deed conveyed or retained the mineral interests. *Id.* at 751, 22 So. 2d at 496. The court also weighed in its decision the conduct of the grantor lumber company which was inconsistent with any ownership claim. *Id.* at 751-52, 22 So. 2d at 496; *see* Ewing, *supra* note 21, at 61 (explaining court's decision to allow extrinsic evidence). In contrast to the inconsistent acts in *Richardson*, the grantor in *Miller* executed a lease and two royalty deeds. *Miller*, 468 So. 2d at 866.

[54] *See supra* notes 48-53 and accompanying next.

[55] *See supra* notes 30-34 and accompanying text.

[56] *See supra* notes 35-40 and accompanying text.

[57] *See supra* notes 41-47 and accompanying text.

Richardson court, the court in *Miller* could have considered the circumstances surrounding the conveyance, examining the conduct of the parties to determine their intent and the meaning of the deed.[58]

II. Reasonable Necessity Burden of Proof for Quasi-Easement

In *Fourth Davis Island Land Co. v. Parker*,[59] the Mississippi Supreme Court held that if an implied easement is a quasi-easement, rather than an easement by necessity, then reasonable necessity, not strict necessity, is the burden of proof.[60]

Fourth Davis Island Land Co. and Ernest and Bobby Parker owned adjoining tracts of land with one private power line servicing both parcels.[61] When the power line was constructed, the tracts were commonly owned by one party.[62] Fourth Davis requested an injunction to prohibit the Parkers from interfering with Fourth Davis' maintenance of the power line on the Parker property, and with Fourth Davis' plan to string a second line on the poles across the Parker property to separate the electrical service.[63] Fourth Davis asserted that it had an implied easement to service the power line located on the Parker property, the servient parcel.[64] The chancellor ruled that Fourth Davis did not have an implied easement because Fourth Davis failed to prove strict necessity.[65]

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[58] *See supra* notes 48-53 and accompanying text.

[59] 469 So. 2d 516 (Miss. 1985).

[60] *Id.* at 521.

[61] *Id.* at 517. The power line terminated on the tract owned by Fourth Davis. *Id.* The line stretched across the Parker property to reach the Fourth Davis land. *Id.* at 517-19.

[62] *Id.* at 517-18. The father of Ernest Parker, who was the grandfather of Bobby Parker, had owned all the subject property at the time the line was constructed. *Id.* at 517-19.

[63] *Id.* at 518-19. A single electric meter served both tracts, and Fourth Davis had paid for all electricity used by both tracts since 1971. *Id.* at 518. Fourth Davis agreed to bear the entire expense of electricity as partial consideration for the cancellation of a lease on the Fourth Davis property. *Id.* Upon the expiration date of the lease, Fourth Davis asserted that it had the right to maintain the line absent any authorization by the Parkers. Thereafter, Fourth Davis notified the Parkers of its intention to string the additional line. *Id.* Parker, however, warned Fourth Davis that it did not have permission to enter the Parker property for any reason. *Id.*

[64] *Id.* at 519. Fourth Davis reasoned that its predecessor in title possessed an implied easement across the Parker property. *Id.* The Parkers denied the necessity of the power line for the use of the Fourth Davis property, the need for an additional power line, and the right of Fourth Davis to maintain and repair the existing line stretched across the Parker property. *Id.*

[65] *Id.* at 517, 520. According to the Mississippi Supreme Court, the chancellor rea-

On appeal, the Mississippi Supreme Court held that if an easement is not a way of necessity, the burden of proof is reasonable necessity not strict necessity.[66] Further, the court stated that the test for determining reasonable necessity is whether an alternative for the easement would involve "disproportionate expense and inconvenience," or whether a substitute is available through "reasonable labor or expense."[67] Ultimately, the court decided that Fourth Davis failed to prove reasonable necessity because the "alternative" of purchasing electrical generators as a "substitute" for power lines did not involve "disproportionate expense and inconvenience."[68]

The *Fourth Davis* court, basing its decision on a "close reading" of *Bonelli Brothers v. Blakemore*,[69] noted the distinction between implied

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soned that an implied easement arises only if it is a strict necessity for the enjoyment of the property. *Id.* at 520. Although the chancellor denied the implied easement, he did rule that Fourth Davis possessed a right to electrical service through the existing line, when available. *Id.* at 517. In addition, the chancellor awarded Fourth Davis a reimbursement of funds in payment for electricity used by the Parkers less the amount Fourth Davis owed Parker for maintenance and repair. *Id.*

[66] *Id.* at 521. The supreme court distinguished judicial decisions involving ways of necessity from cases in which an implied easement is highly convenient to the enjoyment of the property. *Id.* The court also noted that the availability of reasonable alternative measures might make an implied easement of convenience unnecessary. *Id.*

Decisions cited by the court in the "strictly necessary" category were: Medina v. State *ex. rel.* Summer, 354 So. 2d 779, 784 (1977)(implied easement denied where way of ingress and egress exists); Warwick v. Pearl River Valley Water Supply Dist., 246 So. 2d 525, 529 (Miss. 1971)(implied easement granted when property is not accessible to a public road); and Pleas v. Thomas, 75 Miss. 495, 500, 22 So. 820, 820-21 (1897)(easement implied over lands of seller when purchased tract is surrounded in part by lands of both buyer and strangers to the conveyance). *Fourth Davis*, 469 So. 2d at 521.

Cases cited by the supreme court concerning easements of convenience which were not "strictly necessary" were: Hutcheson v. Sumrall, 220 Miss. 834, 843-44, 72 So. 2d 225, 229 (1954)(purchaser granted implied easement to use water, if available, from wells on seller's property); Shipman v. Lovelace, 214 Miss. 241, 249-50, 58 So. 2d 657, 659 (1952)(party granted implied easement to sewerage line and driveway necessary for enjoyment of property). *Fourth Davis*, 469 So. 2d at 521.

[67] *Fourth Davis*, 469 So. 2d at 521. The court adopted the test for reasonable necessity as follows: "The test of necessity is whether a party claiming the right can, through reasonable costs, create a substitute in his own estate." *Id.* at 520 (quoting 28 C.J.S. *Easements* § 33 at 692-93 (1981)).

[68] *Fourth Davis*, 469 So. 2d at 521-22. The court noted that the sum spent for electricity by Fourth Davis would be sufficient to purchase generators. *Id.* at 521. Further, the court reasoned that other landowners used generators to supply power and that both Fourth Davis and the Parkers used additional non-electric power sources. *Id.*

[69] *Id.* at 520-21; *see* Bonelli Bros. v. Blakemore, 66 Miss. 136, 5 So. 228 (1888). The supreme court corrected the misinterpretation of *Bonelli* by the chancellor that an implication of all easements requires strict necessity. *Fourth Davis*, 469 So. 2d at 520-521.

easements involving ways of necessity and implied easements of things not strictly necessary but "highly convenient or essential to the full enjoyment of the land."[70] An implied easement by necessity usually arises when a claimed dominant parcel is landlocked after its severance from the claimed servient tract.[71] An easement not of strict necessity, described as a "quasi-easement" or an "easement implied from prior use,"[72] may be implied to protect the expectation that a present use of the land will continue after the division of the property.[73]

Easements by necessity and easements implied from prior use share two common elements of proof: first, that the claimed dominant and servient tracts were held in common ownership which ceased when a transfer separated the parcels; and second, that the claimed easement is necessary.[74] In order to establish a quasi-easement, the claimant must prove a third element: an apparent, permanent, and important use by the owner of the claimed servient tract for the benefit of the claimed dominant tract prior to transfer.[75] The first two elements

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[70] *Fourth Davis*, 469 So. 2d at 520; *see supra* note 66 and accompanying text.

[71] *See* Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary"*, 58 N.C.L. Rev. 223, 224 (1980); *see also* 3 R. Powell, Powell on Real Property ¶ 410 at 34-61 to -64 (1985)(implied easements arise when parcel is landlocked after sale, and when prior use has given rise to quasi-easement; right of way to provide access to landlocked property is most common type of easement by necessity); *see supra* note 66 for Mississippi cases involving strict necessity due to landlocked property.

[72] Glenn, *supra* note 71, at 225. Glenn prefers the more descriptive and less technical term "easement implied from prior use" over the general term "quasi-easement." *Id.*; *see* 3 R. Powell, *supra* note 71, ¶ 411 [1] at 34-91. Powell prefers the traditional distinction between easements of necessity and easements implied from prior use, but he noted that the Restatement of the Law of Property made no such distinction and considered all implied easements to be under the same general category. *Id.* Powell also states that when there has been a unity of ownership of two contiguous parcels, a quasi-easement may arise to allow the servient parcel to provide "drains, sewers, irrigation ditches, roadways or stairways which increase the useability" of the dominant parcel. *Id.*

[73] Glenn, *supra* note 71, at 224; *see* 3 R. Powell, *supra* note 71, ¶ 411 [2] at 34-93 to -94. Powell states that in order for a quasi-easement to arise, the prior use must have been "apparent, permanent, and important for the enjoyment of the quasi-dominant parcel." *Id.*

[74] 3 R. Powell, *supra* note 71, ¶¶ 410 at 34-74, 411[1] at 34-91; Glenn, *supra* note 71, at 22.

[75] Glenn, *supra* note 71 at 225; 3 R. Powell, *supra* note 71, ¶ 411[2][c] at 34-92 to -102. Powell notes that different jurisdictions disagree in the definition and identification of an "important" use of a dominant parcel, and that some courts follow the "reasonably necessary" rule while others require proof that the use is necessary for the "beneficial, convenient, comfortable, or reasonable enjoyment of such land." *Id.*

appear identical in both easement situations.[78] However, the third additional element required for proving a quasi-easement suggests that the meaning of "necessity" differs according to whether the easement is one by necessity or implied from prior use.[77] Otherwise, the third requirement of proof would be irrelevant.[78]

Courts have wrestled with the task of establishing a general rule and test for determining whether an easement implied from prior use is a "necessity."[79] In *Fourth Davis*, the Mississippi Supreme Court reiterated the *Bonelli* court's general rule for the implication of an easement not a way of necessity, but "apparently permanent, obvious, and continuous."[80] However, the court refrained from recognizing the uncrystallized tests espoused in *Bonelli* for determining the implication of such an easement.[81] Instead, the court established the test as one of "reasonable necessity."[82]

The test of "reasonable necessity" may be a pliable test, varying the importance of permanence, obviousness, continuity, and convenience factors in relation to each other.[83] In addition, the intention of the parties to create such an easement, in light of circumstances including the aforementioned factors, may be determinative.[84] However, the Mississippi Supreme Court clearly confines the test of "necessity" to the question of whether an alternative or substitute for the ease-

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[78] Glenn, *supra* note 71, at 225.

[77] *Id.*

[78] *Id.*; see 3 R. POWELL ¶ 411[2][c] at 34-99 to -101. When the concept of an important use is considered in terms of necessity, the distinction between quasi-easement and easement by necessity becomes unclear. *Id.*

[79] Glenn, *supra* note 71, at 227 n.9 (quoting 3 H. TIFFANY, THE LAW OF REAL PROPERTY ¶ 786, at 271 (3d ed. 1939 & Cum. Supp. 1985); *see* 3 R. POWELL, *supra* note 71, ¶ 410 at 34-77 to -78. Powell asserts that although easements of necessity are denied when the claim is based on "mere convenience," it is more difficult to resolve cases which fall between the extremes of "absolute necessity" and "mere convenience." *Id.* ¶ 410 at 34-75 to -77. Some courts have adopted a rule requiring "absolute necessity" while others have required a "reasonable necessity." *Id.* ¶ 410 at 34-77.

[80] *Fourth Davis*, 469 So. 2d at 520 (quoting Bonelli Bros. v. Blakemore, 66 Miss. 136, 143, 5 So. 228, 230 (1888)).

[81] *Fourth Davis*, 469 So. 2d at 521; *see* Bonelli Bros. v. Blakemore, 66 Miss. 136, 143, 5 So. 228 (1888). The considerations for establishing an implied easement, mentioned as tests in *Bonelli*, were the condition of the entire parcel prior to the severance of the dominant estate, the nature of the claimed easement, and the obviousness and continuousness of the claimed easement. *Id.* at 143, 5 So. at 231; *see supra* note 66 and accompanying text.

[82] *Fourth Davis*, 469 So. 2d at 521.

[83] *See* 2 AMERICAN LAW OF PROPERTY, ¶ 8.43 at 263.

[84] *See id.* ¶¶ 8.40-.43, at 261-63; 3 R. POWELL, *supra* note 71 ¶ 411 [2], at 34-94, 34-99.

ment involves "disproportionate expense" and "inconvenience."[85] Thus, although the Mississippi Supreme Court has established "reasonable necessity" as the burden of proof for easements implied from prior use, the strictures of the "necessity" test weaken the impact of this significant case.

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[85] *Fourth Davis*, 469 So. 2d at 11. Practically, whether an easement is "permanent, obvious, and continuous" is only significant in satisfying the third element of proof, not in determining the "reasonable necessity" of the easement. *See supra* text accompanying notes 75-78.

TORTS

The Supreme Court of Mississippi decided thirty-three cases relating to torts in 1985. The various topics of tort law addressed by the court included medical malpractice,[1] negligence,[2] the "second impact"

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[1] Clayton v. Thompson, 475 So. 2d 439, 445 (Miss. 1985)(recovering for physician's negligence allowed only when there is loss of reasonable probability of substantial improvement in plaintiff's condition; no recovery for "loss of chance"), *see infra* notes 94-105 and accompanying text; Reikes v. Martin, 471 So. 2d 385, 393 (Miss. 1985)(objective standard applied in informed consent cases so that question is whether or not reasonable, prudent patient, fully advised of material known risks, would have consented to suggested treatment), *see infra* notes 44-58 and accompanying text; Trapp v. Cayson, 471 So. 2d 375, 384-85 (Miss. 1985)(hospital not vicariously liable for negligence of physician when there is no contract between hospital and physician, patient requested treatment from physician or his associates, and patient was billed by physician), *see infra* notes 79-93 and accompanying text; Hardy v. Brantley, 471 So. 2d 358, 371 (Miss. 1985)(where hospital holds itself out to public as providing given service, and contracts with physician to provide such service, and such patient engages services of hospital without regard to identity of particular physician, and where patient relies upon hospital to give treatment, doctrine of respondeat superior applies and hospital is vicariously liable for damages proximately resulting from neglect of physician), *see infra* notes 59-78 and accompanying text; Hammond v. Grissom, 470 So. 2d 1049, 1054-55 (Miss. 1985)(although in medical malpractice case plaintiff is generally required to present expert medical testimony, exception exists with regard to matters within common knowledge of laymen such as absence of medical care in emergency room rather than misfeasance of complex medical diagnosis or treatment); Todd v. Turnbull, 469 So. 2d 71, 75 (Miss. 1985)(defendant physician may testify as to what he did and whether his actions were reasonable and free from negligence); Hall v. Hilbun, 466 So. 2d 856, 873 (Miss. 1985)(physician's non-delegable duty of care to patient is to use his knowledge to treat patient through maximum reasonable recovery with same reasonable diligence, skill, competence, and prudence as practiced by minimally competent physicians in same field of practice throughout the United States who have same general facilities, equipment, services, and options available to them), *see infra* notes 20-43 and accompaning text.

[2] Miles v. Duckworth, 481 So. 2d 757, 758-59 (Miss. 1985)(jury instruction which related failure to keep proper look out or to exercise reasonable and proper control of vehicle was not confusing and properly submitted issues to jury); Nichols v. Western Auto Supply Co., 477 So. 2d 261, 262-63 (Miss. 1985)(when appellees requested jury instruction on contributory/comparative negligence but appellants did not, appellants cannot appeal court's refusal of instruction); Stilwell v. Williams, 476 So. 2d 24, 26 (Miss. 1985)(scope of appellate court review limited to question of whether trial court abused discretion in granting new trial when appellant declined remittitur); Johnson v. City of Pass Christian, 475 So. 2d 428, 431 (Miss. 1985)(judgment notwithstanding verdict sustained where photographs contradict plaintiff's tenuous theory of accident); Amiker v. Brakefield, 473 So. 2d 939, 940 (Miss. 1985)(granting instruction requiring plaintiff to prove damages by preponderance of evidence and with reasonable certainty constitutes

doctrine and strict liability,[3] nuisance,[4] social hosts and laws regarding alcoholic beverages,[5] accident reconstructionists' expert testimony,[6] asbestosis,[7] respondeat superior,[8] wrongful death,[9] joint tortfeasors,[10]

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reversible error); Edwards v. Patrick, 469 So. 2d 92, 95 (Miss. 1985)(passenger's statement to driver to avoid hitting animal in road does not constitute negligence); Bell v. City of Bay St. Louis, 467 So. 2d 657, 663 (Miss. 1985)(in negligence action against city, residents of city qualify as jurors where interest of jurors is sufficiently remote so that it is overcome by desirability of jury drawn from fair cross section of county where case is heard); Holladay v. Tutor, 465 So. 2d 337, 338 (Miss. 1985)(counsel committed reversible error by twice questioning witnesses about cigar box filled with marijuana and quaaludes when there was no evidence that driver was intoxicated or under influence of drugs); Byrd v. F-S Prestress, Inc., 464 So. 2d 63, 66-67 (Miss. 1985)(MISS. CODE ANN. § 63-3-703(b)(1972) not interpreted to require that left turn made across four-lane highway be executed so that driver moves directly to right lane as quickly as possible).

[3] Toliver v. Gen. Motors Corp., 482 So. 2d 213, 219 (Miss. 1985)(automobile manufacturer may be liable for defective design in "second impact" case under theories of negligence and/or strict liability), *see infra* notes 106-129 and accompanying text; Thomas v. Munson Mach. Co., 463 So. 2d 1044, 1045 (Miss. 1985)(reaffirmed adoption of strict liability as set out in State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966)).

[4] Phillips v. Davis Timber Co., 468 So. 2d 72, 78 (Miss. 1985)(under nuisance doctrine, plaintiff may recover damages for physical invasion of his property upon showing that defendant was responsible for invasion).

[5] Edwards v. Ellis, 478 So. 2d 282, 285-86 (Miss. 1985)(although blood alcohol test taken pursuant to MISS. CODE ANN. § 63-11-7 (1972) was not admissible, test taken as part of medical treatment was admissible since medical privilege had been contractually waived); Boutwell v. Sullivan, 469 So. 2d 526, 529 (Miss. 1985)(neither Mississipi statutes nor common law impose liability on social host serving intoxicating liquor to guest who becomes intoxicated and commits tort), *see infra* notes 149-159 and accompanying text; Mills v. Nichols, 467 So. 2d 924, 929 (Miss. 1985)(plaintiff's admission to consumption of several beers in hours preceding accident is sufficient basis for submitting to jury question of whether plaintiff's reaction time had been impaired by intoxicating liquors).

[6] Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311, 314 (Miss. 1985)(accident reconstructionist may qualify as expert witness), *see infra* notes 130-136 and accompanying text.

[7] Jackson v. Johns-Manville Sales Corp., 469 So. 2d 99, 99 (Miss. 1985)(Mississippi Supreme Court declined certification from Fifth Circuit with respect to the questions of whether mental anguish damages, damages for cancer as probable future consequence, and punitive damages are available in asbestos products liability actions). In *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986), the Fifth Circuit answered these questions.

[8] Jones v. Toy, 476 So. 2d 30, 32 (Miss. 1985)(city supervisor's knowledge of employee's derelictions imputed to city; therefore, city was liable for employee's negligence).

[9] McLemore v. Gammon, 468 So. 2d 84, 87 (Miss. 1985)(surviving adoptive brothers and sisters may bring statutory wrongful death action to exclusion of natural brothers and sisters of adopted child).

[10] Wilson v. Giordano Ins. Agency, 475 So. 2d 414, 417 (Miss. 1985)(although assignment of cause of action from plaintiff to one of two joint tortfeasors was valid, tortfeasor was estopped from pursuing cause of action against other tortfeasor since one tortfeasor

negligent misrepresentation,[11] alienation of affections and criminal conversation,[12] slander and libel.[13] Those cases which significantly clarify, alter, or impact on Mississippi law have been selected for commentary.

I. Medical Malpractice

The Mississippi Supreme Court addressed several principles of law relating to medical malpractice in 1985. Special attention will be directed to the adoption of the national standard of care for physicians, the doctrine of informed consent, the application of the respondeat superior doctrine to hospitals, and the "loss of a chance of greater recovery" doctrine.

A. Adoption of the National Standard of Care for Physicians

There are three generally recognized standards by which a physician's performance is measured: the locality or neighborhood rule,[14] the similar locality rule,[15] and the universal or national rule.[16] Historically,

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may not seek contribution from joint tortfeasor); Smith v. Falke, 474 So. 2d 1044, 1047 (Miss. 1985)(parol evidence rule applies only to controversies between parties to written instrument and those claiming under them; parol testimony admissible to show injured party did not intend to release other tortfeasor); Clark v. Columbus & Greenville Ry., 473 So. 2d 947, 951-52 (Miss. 1985)(court's determination that damages verdict returned by jury against one defendant was inadequate does not give plaintiff second chance at co-defendant who was exonerated by jury).

[11] Shogyo Int'l Corp. v. First Nat'l Bank, 475 So. 2d 425, 427 (Miss. 1985)(bank liable for officer's material misrepresentation when officer failed to exercise reasonable degree of diligence and expertise and plaintiff reasonably relied on misrepresentation and suffered damages as proximate result), *see infra* notes 139-148 and accompanying text; Chapman v. Chapman, 473 So. 2d 467, 470-71 (Miss. 1985)(party alleging equitable estoppel has burden of proving that representation was made, that she changed her position in reliance upon such representation, and consequently suffered detriment).

[12] Camp v. Roberts, 462 So. 2d 726, 727 (Miss. 1985)(alienation of affection and criminal conversation are recognized as torts in Mississippi).

[13] Bush v. Mullen, 478 So. 2d 313, 314 (Miss. 1985)(granting of summary judgment in slander action reversed so that court could determine whether qualified privilege for communications between employer and employees was destroyed by communication of statement with malice or outside permissible circle).

[14] Hall v. Hilbun, 466 So. 2d 856, 866 (Miss. 1985). Under the locality rule, the courts consider the type of community in which the physician practices because, supposedly, a country doctor cannot be expected to have the same facilities, equipment, or opportunities for learning as a city doctor. W. Prosser & W. Keeton, Prosser and Keeton on Torts § 32, at 187-88 (5th ed. 1984).

[15] Hall v. Hilbun, 466 So. 2d 856, 868 (Miss. 1985). The similar locality rule broadens the locality rule to include towns of the same general type. W. Prosser & W. Kee-

Mississippi courts applied the locality rule which required a physician to exercise the same reasonable and ordinary care, skill, and diligence as physicians and surgeons in the same general area of practice in the same neighborhood.[17] The court expanded this rule in *King v. Murphy*[18] to encompass the entire state of Mississippi and a reasonable distance adjacent to state boundaries.[19]

In 1985, the *King* decision was refined and elucidated in *Hall v. Hilbun*[20] in which the court finally adopted the national standard of care.[21] *Hall* involved a medical malpractice case in which Dr. Hilbun was charged with negligent post-operative treatment.[22] The testimony

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TON, *supra* note 14, at 188. Many jurisdictions adhere to the similar locality rule because physicians within the same community are reluctant to testify against one another and also because the physicians within the community could establish a substandard degree of care and skill. Annot., 99 A.L.R. 3d 1133, 1139 (1980).

[18] Hall v. Hilbun, 466 So. 2d 856, 868 (Miss. 1985). Under the national rule, the character of the locality in which the physician practices is merely a consideration in determining whether he acted reasonably under the circumstances. Annot., *supra* note 15, at 1139. His duty is to use that degree of care and skill which is expected of a reasonably competent practitioner in the same specialty or general field in the same circumstances. *Id.*

[17] *See, e.g.*, Hill v. Stewart, 209 So. 2d 809, 811 (Miss. 1968)(Pascagoula physician held to general standard of care of physicians in Mississippi Gulf Coast area); DeLaughter v. Womack, 250 Miss. 190, 201-02, 164 So. 2d 762, 766 (1964)(physician held to standard of physicians in good standing in same neighborhood); Copeland v. Robertson, 236 Miss. 95, 110, 112 So. 2d 236, 241 (1959)(physician held to standard of care possessed by physicians in good standing in same locality).

[18] 424 So. 2d 547, 550 (Miss. 1982).

[19] *Id.* The holding in *King* was foreshadowed in Dazet v. Bass, 254 So. 2d 183, 187 (Miss. 1971), where the plaintiff contended that since "physicians now attend the same colleges, receive the same post graduate courses in their specialties, and go to the same seminars," then geographical limitations were no longer valid in controlling the standards applicable to a physician. *Id.* at 187.

For a thorough discussion of Mississippi's application of *King* and the expansion of the locality rule, see *1983 Mississippi Supreme Court Review*, 54 MISS. L.J. 167, 170-72 (1984).

[20] 466 So. 2d 856 (Miss. 1985)(en banc).

[21] *Id.* at 873. Presiding Justice Roy Noble Lee and Justice Walker asserted that the *King* rule was clearly stated and should not be modified; accordingly, they dissented from the majority opinion. *Id.* at 883-884 (Lee, Roy Noble, J., dissenting).

[22] *Id.* at 861. After performing an exploratory laparotomy on Terry Hall, Dr. Hilbun remained in the recovery room with her from approximately 1:35 p.m. until 2:50 p.m. when she was taken to her private room. In the following hours, Mrs. Hall complained to her nurses of pain and labored breathing but Dr. Hilbun was not informed. Fourteen hours after returning to her private room, Mrs. Hall died of adult respiratory distress syndrome. *Id.* at 860-61. Mr. Hall contended that Dr. Hilbun had been negligent in not inquiring as to his patient's post-operative health and in failing to give appropriate instructions to the nursing staff. *Id.* at 861.

of two expert witnesses from Cleveland, Ohio, was excluded due to the trial court's application of the old locality rule[23] and, consequently, a directed verdict was granted in favor of Dr. Hilbun.[24]

The Mississippi Supreme Court opinion by Justice Robertson reconsidered the standard of care applicable to physicians and the matter of how experts may be qualified in medical malpractice litigation.[25] The court noted that the standard consists of two separate rules—a substantive rule and an evidentiary rule.[26] The *Hall* court modified the substantive rule and held that due to the "nationalization" of medical education and training,[27] the national standard is the appropriate standard of care to which a physician should be held.[28] Therefore, physicians are now expected to possess or have access to medical knowledge that is commonly available to minimally competent physicians in the same specialty or general field of practice *throughout the United States*.[29] Thus, each physician is bound to render, during the entire caring process, services consistent with the minimally acceptable level of competence given his qualifications, expertise, and the circumstances of the particular case.[30] The physician must also have a practical working knowledge of the available facilities, equipment, resources, and options and their limitations.[31] Because the resources available in

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[23] *Id.* at 864. The lower court relied upon Dazet v. Bass, 254 So. 2d 183 (Miss. 1971), which was the Mississippi Supreme Court's latest ruling on the matter at that time. *Hall*, 466 So. 2d at 864.

[24] *Hall*, 466 So. 2d at 866.

[25] *Id.* at 860.

[26] *Id.* at 866. The standard, applied as a rule of substantive law, relates to the duty applicable to the defendant physician—that being the duty to treat each patient with "such reasonable and ordinary care, skill and diligence and to exercise such good medical judgment as physicians and surgeons in good standing in the same neighborhood or locality, in the same general line of practice." *Id.* The standard is a rule of evidence in that it limits the pool from which experts may be drawn by establishing geographical boundaries. *Id.*

[27] *Id.* at 870. The admission standards and curricula in medical schools throughout the country are substantially the same. *Id.* Internships and residency programs for those entering specialties have the same basic components and nationally uniform standards are enforced for certification in specialties. *Id.* Furthermore, physicians may now travel more freely and have easy access to medical journals and seminars throughout the country for continuing medical education. *Id.*

[28] *Id.* at 871.

[29] *Id.*

[30] *Id.* The caring process includes, but is not limited to, the examination, history, testing, diagnosis, treatment, medication, surgery, and follow-up. *Id.*

[31] *Id.* at 872. Resources include health care personnel and their general level of knowledge and competence. *Id.* Options include specialized services or facilities that may be available in larger communities. *Id.*

different communities vary widely, the treatment reasonably expected of a physician in a rural community may differ from that of a physician in a metropolitan area.[32] With this consideration incorporated into the national standard, locale may still play a role in setting the standard.

In summary, under *Hall*, a physician's non-delegable duty of care is the following:

> [G]iven the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment and options.[33]

The *Hall* court also considered which expert witnesses may be qualified to testify.[34] In *King*, the Mississippi Supreme Court had altered the evidentiary rule by removing the geographical limitations applicable to experts so that an expert from New York, for example, could testify if he had familiarized himself with the standard of care to be applied in the case.[35] Thus, the professional residence of an expert witness was not relevant.[36] The *Hall* court noted that any qualified medical expert may state his opinion regarding the meaning and import of a physician's duty of care given the circumstances.[37] If the expert has certain information about the specific case available to him, he may also express his opinion, based upon that information, as to what a minimally competent physician would have done in the circumstances.[38]

The expert may not testify further, however, without familiarizing himself with the facilities, resources, services, and options available.[39]

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[32] *Id.* at 872.

[33] *Id.* at 873.

[34] *Id.* at 873-75.

[35] *Id.* at 867; *King*, 424 So. 2d at 550. The *Hall* court noted that although *King* had been interpreted in various ways, the holding of *King* was that "where a proferred medical expert lives or practices per se has no relevance to whether he may give expert opinion testimony at trial." *Hall*, 466 So. 2d at 867.

[36] *Hall*, 466 So. 2d at 874.

[37] *Id.* at 874.

[38] *Id.* at 874-75. The information upon which the expert may base his opinion may include symptoms, histories, test results, x-rays, vital signs, and results of his own physical examination. *Id.* at 874.

[39] *Id.* at 875. This familiarization may occur by visiting the facilities, hearing de-

Once he has done this, he may state what the defendant physician's duty of care was and whether his actions were in compliance with the standard.[40]

The new national standard set forth in *Hall* applies retroactively as is generally true with judicially enunciated rules of law.[41] Therefore, in cases tried after *Hall* and in appellate cases where the issue has been properly preserved, the evidentiary rule initially announced in *King* and refined in *Hall* applies.[42] The substantive portion of the national standard of care, as it affects the physician's duty of care, also applies retroactively.[43]

B. The Doctrine of Informed Consent

The court addressed the doctrine of informed consent in *Reikes v. Martin*.[44] Upon discovering that Mrs. Martin suffered from uterine cancer, a conference of doctors suggested that she undergo cobalt treatments.[45] She received the treatments from the defendant doctors who were partners in a radiology group.[46] At trial, Mrs. Martin claimed that she was permanently disabled because the radiologists negligently administered the treatment.[47] The jury returned a verdict in favor of

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scriptions of the facilities, interactions with physicians in the area, or even by a "properly predicated and phrased hypothetical question." *Id.*

[40] *Id.*

[41] *Id.; see, e.g.*, Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 673 (Miss. 1983)(abolishment of privity requirement in home construction contracts applied retroactively); Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 464-65 (Miss. 1983)(allowance of recovery of punitive damages in chancery court applied retroactively).

[42] *Hall*, 466 So. 2d at 876. The court found no injustice in applying the evidentiary aspect of the rule retroactivly since physicians do not rely on rules of evidence when they practice. *Id.*

[43] *Id.* at 877. The court conceded that members of society must be able to rely on laws in effect so that they may predict the legal consequences of their activities. *Id.* However, the court reasoned that since the holding of *Hall* was foreshadowed in *King*, the potential unfairness of retroactive application did not exist. *Id.*

Chief Justice Patterson and Justice Walker dissented from the portion of the opinion granting retroactive application. *Id.* at 880 (Patterson, C.J., dissenting).

[44] 471 So. 2d 385 (Miss. 1985)(en banc).

[45] *Id.* at 388.

[46] *Id.*

[47] *Id.* Mrs. Martin had twenty-three treatments to her lower abdomen and lower back alternatively. *Id.* She suffered side effects such as nausea, diarrhea, and redness of the skin. *Id.* Most of the side effects ceased upon the completion of treatment but Mrs. Martin began to experience back pain which was accompanied by a rotten odor. *Id.* A sore was found which necessitated the removal of part of the coccyx and the sacrum. *Id.* After this surgery, she was unable to walk and developed a contracture of her right leg.

Mrs. Martin and the physicians appealed.[48]

On appeal, the radiologists contended that the trial court erred in instructing the jury that the physicians could be liable for failing to inform Mrs. Martin of the risk involved when no evidence was introduced showing that she would have foregone the therapy had she been informed.[49] The Mississippi Supreme Court noted that it is well-established law that a physician has a duty to warn his patient of known risks[50] related to a proposed treatment so that the patient may make an intelligent decision in deciding whether or not to submit to the treatment.[51] Mississippi law applies the "prudent patient" or "materiality of the risk" standard in determining which risks must be revealed to the patient.[52] This standard requires a physician to disclose known risks which would be material to a prudent patient in determining whether or not to undergo treatment.[53]

Even if the doctor breaches his duty to inform, in order for the patient to recover damages, a causal connection must exist between the

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Id. Mrs. Martin also had to be treated for a sore found in her lower abdomen. *Id.*

[48] *Id.* at 387. The Mississippi Supreme Court addressed several assignments of error. The court held that the lower court erred in granting an instruction removing the question of whether Mrs. Martin was contributorily negligent from the jury. *Id.* at 388-89. Conflicting evidence as to the issue of contributory negligence made it a fact question to be considered by the jury even though it was not pled by the physicians. *Id.* at 389. The court also held that the lower court erred in granting instructions applying the subjective standard of what "Mrs. Martin" might reasonably expect from the defendant doctors instead of what a reasonably prudent patient would have expected. *Id.*

[49] *Id.* at 391.

[50] *Id.* at 392. "Known risks," as defined by the court, are those which would be known to a "careful, skillful, diligent and prudent practitioner or specialist, in this case a therapeutic radiologist, practicing in Hattiesburg, Mississippi, in 1975." *Id.* at 393 n.3; *see* Copeland v. Robertson, 236 Miss. 95, 110, 112 So. 2d 236, 241 (1959)(physician bound to bestow such reasonable and ordinary care, skill, and diligence as physician in same general line of practice).

[51] *Reikes*, 471 So. 2d at 392. The court recognized this duty in Ross v. Hodges, 234 So. 2d 905 (Miss. 1970).

[52] *Reikes*, 471 So. 2d at 392.

[53] *Id.* In Ross v. Hodges, 234 So. 2d 905 (Miss. 1970), the court applied the professional standard which considers whether physicians customarily inform their patients about the type of risk involved, or whether a reasonable physician would make the disclosure. *Id.* at 909; *see* W. PROSSER & W. KEETON, *supra* note 14, at 191. Although the Mississippi Supreme Court did not refer to the professional standard, or discuss the reasons for changing the standard, one justification indicated by Professor Prosser is that the professional standard leaves the right of choice to the medical community, whereas the basis of the informed consent doctrine is the premise that individuals have the right to determine what is done to their bodies. W. PROSSER & W. KEETON, *supra* note 14, at 190-91. Therefore, the duty should be defined in terms of what a reasonable patient would want to know. *Id.* at 191.

breach of that duty and the injuries suffered by the patient.[54]. In making this determination, there are two possible standards that may be applied—the subjective or the objective standard.[55] The subjective standard requires the plaintiff to testify as to whether or not *he* would have consented to treatment had he been informed properly.[56]

Under the objective test, the issue is whether a reasonably prudent patient would have given consent if he had been fully advised of the risks.[57] In *Reikes*, the Mississippi Supreme Court noted that the patient at trial, knowing the result of the treatment, would most certainly claim that he would not have consented to treatment if he had been properly informed.[57a] The court therefore joined with the majority of the states and adopted the objective standard.[58]

C. *The Application of the Respondeat Superior Doctrine to Hospitals*

In *Hardy v. Brantley*,[59] the Mississippi Supreme Court enunciated for the first time the rule that a hospital operating an emergency room may be vicariously liable under the theory of respondeat superior for the malpractice of one of its emergency services physicians.[60] Brad Ewing suffered severe abdominal pains and was taken to the Hinds General Hospital Emergency Room in Jackson, Mississippi, for treatment.[61] After taking various tests,[62] Dr. Brantley, an emergency services physician, apparently concluded that Ewing was suffering from

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[54] *Reikes*, 471 So. 2d at 392. No causal connection would exist if the patient would have had the treatment even if he had been fully informed. Therefore, the court was faced with the task of adopting some standard upon which to base this assessment.

[55] *Id.*

[56] *Id.* In Ross v. Hodges, 234 So. 2d 905 (Miss. 1970), the court did not expressly refer to the objective or subjective standard but inferred that the subjective standard was applicable by noting that the patient stated that she would not have had the operation if she had thought she might suffer paralysis. *Id.* at 907.

[57] *Reikes*, 471 So. 2d at 392. Some courts have adopted a compromise standard by substituting an "ordinary" patient for a "reasonable" one, and by considering the individual's fears and beliefs in the determination of what a patient in that position would have done. W. PROSSER & W. KEETON, *supra* note 14, at 192.

[57a] *Reikes*, 471 So. 2d at 392-93.

[58] *Id.* at 393.

[59] 471 So. 2d 358 (Miss. 1985)(en banc).

[60] *Id.* at 360.

[61] *Id.*

[62] *Id.* Dr. Brantley took Ewing's blood pressure, ordered various blood tests, and ordered a urinalysis which was never performed. Dr. Brantley failed to check Ewing's stool and failed to order X-rays of the lower and upper abdomen. *Id.*

heat exhaustion[63] and treated him accordingly.[64] Ewing was released but returned the following day because he continued to experience intense abdominal pain.[65] That afternoon Ewing died.[66] An autopsy revealed the cause of death to be a perforated duodenal ulcer and peritonitis.[67]

In the wrongful death action filed on Ewing's behalf, Dr. Brantley and Hinds General Hospital were charged with negligence in the diagnosis and treatment of Ewing.[68] The trial court granted a directed verdict in favor of both defendants after refusing to qualify Dr. Ransom, a specialist in emergency medicine from Birmingham, Alabama, as an expert witness for Ewing.[69] On appeal,[70] the Mississippi Supreme Court held that the trial court erred in light of *Hall v. Hilbun*[71] in excluding Dr. Ransom's testimony because he practiced in Alabama and because he supposedly was not familiar with the standard of care in Jackson, Mississippi, or, particularly, at Hinds General Hospital.[72] Because the trial court had suggested that since Dr. Brantley was an independent contractor, the hospital could not be liable for his faults, the court also considered the possible liability of Hinds General.[73] Hinds General had entered a contractual agreement with Dr. Brantley and the members of the Hinds Emergency Group, under which the physicians were free independent contractors and were required to indemnify the hospital for any and all claims resulting from negligent or intentional acts of the physicians.[74] The court noted that the hospital

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[63] *Id.* The hospital records stated that Ewing had been working outside in the hot sun before he was brought to the emergency room. Ewing's brother, however, claimed that he and his brother had been lying on their couch watching television. *Id.* at 360-61.

[64] *Id.* at 360. Dr. Brantley prescribed Tylenol and Valium and put Ewing on an IV. Once Ewing improved, he was dismissed with a prescription for pain medication and instructions to drink liquids. *Id.*

[65] *Id.* at 361.

[66] *Id.*

[67] *Id.* Evidence introduced in the case revealed that few people die because of a perforated duodenal ulcer and that if the proper tests had been run the diagnosis would have been relatively simple. *Id.* at 358.

[68] *Id.* at 362.

[69] *Id.* at 362-63.

[70] *Id.* at 363.

[71] *Hall*, 466 So. 2d at 874.

[72] *Hardy*, 471 So. 2d at 368.

[73] *Id.* at 369.

[74] *Id.* at 361-62. The extensive contract between Hinds General and Hinds Emergency Group (HEG), which included Dr. Brantley, stated that HEG had "the complete and sole responsibility for furnishing professional services in the Emergency Department" of Hinds General. *Id.* at 361. HEG was obligated to supply emergency services to

and physicians were free to contract as they desired but that the contract did not relate to the hospital's rights and duties regarding the patients.[75] After surveying decisions of sister courts[76] and considering recent trends in hospital care,[77] the court concluded that a hospital is vicariously liable under the doctrine of respondeat superior for a physician's neglect where the hospital holds itself out as providing a certain service to the public, where the hospital contracts with a physician to provide the service, and where the patient engages in, and relies upon,

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all patients except those known to have their own private physician. *Id.* HEG determined its fees but Hinds General reviewed the fees and billed the patients, keeping twenty percent of all such billings. *Id.* The contract also contained a disclaimer which stated that HEG was an independent contractor and the hospital would exercise no control over the methods by which the physicians fulfilled their duties. *Id.* at 361-62. Furthermore, the contract stated that the hospital maintained the responsibility of ensuring that the services were performed in a competent, efficient manner. *Id.* at 362. HEG was also required to carry its own professional liability insurance. *Id.*

[75] *Id.* at 369.

[76] *Id.* at 369-71; *e.g.*, Hannola v. City of Lakewood, 68 Ohio App. 2d 61, 426 N.E.2d 1187, 1190-91 (1980)(when hospital makes emergency services available to public, and when patient, relying on excellent reputation of hospital, utilizes services, hospital is liable to injured patients for any acts of malpractice regardless of contractual arrangements with emergency physicians); Smith v. St. Francis Hosp., Inc., 676 P.2d 279, 282-83 (Okla. App. 1983)(when patient looks solely to hospital for emergency treatment, hospital liable for malpractice of authorized emergency room physician regardless of contract between hospital and physician); Capan v. Divine Providence Hosp., 430 A.2d 647, 649 (Pa. 1980)(hospital liable for emergency physician's malpractice under ostensible agency theory when patient looks to hospital rather than individual physician for care, and when hospital holds out physician as employee).

The court also looked to general tort law for support:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

RESTATEMENT (SECOND) OF TORTS § 429 (1966).

The court noted that this apparent authority agency principle is well-recognized law in Mississippi. *See* Gulf Guar. Life Ins. Co. v. Middleton, 361 So. 2d 1377, 1383 (Miss. 1978)(if principal's conduct is such that reasonably prudent person dealing with agent believes that agent has power he assumes to have, then principal is bound by agent's conduct); Clow Corp. v. J.D. Mullican, Inc., 356 So. 2d 579, 583 (Miss. 1978)(whether one has apparent authority is factual issue).

[77] *Hardy*, 471 So. 2d at 371. The court noted that hospitals now advertise and solicit patients as they compete for patients' fees. *Id.* The hospital is financially rewarded if the physicians practice successfully and, thus, should not be allowed to escape liability if the care falls below acceptable standards. *Id.*

the services of the hospital and not that of a particular physician.[78]

In *Trapp v. Cayson*,[79] the court once again considered the vicarious liability of a hospital for the malpractice of a physician.[80] Dr. Trapp, a radiologist with Radiology of Tupelo, P.A., conducted a vertebral arteriogram on John Cayson at the North Mississippi Medical Center (NMMC).[81] The arteriogram was discontinued when problems were encountered.[82] In the following hours, Cayson experienced a loss of bladder and bowel control and the loss of feeling below the neck; he is now a quadraplegic.[83] Cayson brought suit against Dr. Trapp, Radiology of Tupelo, and NMMC.[84] The lower court directed a verdict in favor of NMMC and the jury returned a verdict against Dr. Trapp and Radiology of Tupelo.[85]

Cayson cross-appealed the dismissal of NMMC contending that Dr. Trapp was an agent of NMMC.[86] The Mississippi Supreme Court, quoting from NMMC's brief, noted that no contract existed between NMMC and Dr. Trapp or between NMMC and Radiology of Tupelo.[87] The hospital had no control over the manner in which the radiologist performed his services and did not select a radiologist for the patient.[88] Furthermore, the hospital did not pay a salary to the radiologist nor

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[78] *Id.* If the patient engages a particular physician who admits the patient to the hospital, the hospital would not then be liable for the physician's malpractice. *Id.*

Presiding Justice Walker, agreeing with the trial court's refusal to qualify the expert, dissented from the majority opinion. He and Justice Dan M. Lee dissented from the portion of the opinion imputing the negligence of an independent contracting physician to the hospital. *Id.* at 374 (Walker, J., dissenting).

[79] 471 So. 2d 375 (Miss. 1985)(en banc).

[80] *Id.* at 383-85.

[81] *Id.* at 377.

[82] *Id.* Cayson experienced severe chest pains which radiated into his left shoulder, arm, and leg. *Id.*

[83] *Id.* at 377, 379.

[84] *Id.* at 376.

[85] *Id.*

[86] *Id.* at 383. Dr. Trapp and Radiology of Tupelo appealed the verdict rendered against them. *Id.* at 376. They first contended that the court erroneously allowed the testimony of an expert witness. *Id.* at 379. The court affirmed the lower court's ruling citing *Hall*, 466 So. 2d at 874-75. The court did reverse the verdict against Dr. Trapp and Radiology of Tupelo due to the granting of a poorly worded, confusing instruction which attempted to submit the issue of Dr. Trapp's negligence to the jury. *Trapp*, 471 So. 2d at 383.

[87] *Trapp*, 471 So. 2d at 384. As members of NMMC's staff, the radiologists must provide coverage for the radiology department at all times. *Id.*

[88] *Id.* The hospital had control through the credentialing process and through audits of the work which were reviewed by medical staff committees, but no direct control over the manner in which the radiologists practiced. *Id.*

did it bill for his services.[89] Therefore, no agency relationship existed.[90] The court distinguished *Hardy*[91] on the grounds that in that case a contract existed between the hospital and physician, and the patient did not select or even know the physician, and also the hospital billed for and collected fees.[92] Accordingly, the *Trapp* court affirmed the dismissal of the complaint against NMMC.[93]

Thus, a hospital may be held vicariously liable for the malpractice of a physician when the hospital holds itself out as providing a certain service to the public, and contracts with a physician to provide that service, and the patient engages and relies upon the services of the hospital and not that of a particular physician.

D. The "Loss of a Chance of Greater Recovery" Doctrine

The Mississippi Supreme Court dealt with the theory termed "loss of a chance of greater recovery" for the first time in *Clayton v. Thompson.*[94] Under this theory, the plaintiff may recover if, due to a physician's negligence, he loses the opportunity of having a greater recovery. Michael Thompson charged Dr. Clayton with medical malpractice in negligently interpreting x-rays taken of Thompson's thumb in July of 1979.[95] Dr. Clayton found no evidence of a fracture of the thumb joint until he later interpreted a second group of x-rays taken in November of 1979.[96] The joint had to be surgically fused and, as a result, Thompson suffered a disability of fifty percent impairment to the hand.[97]

Thompson contended that had Dr. Clayton provided the required level of care in interpreting the initial x-rays, then immediate medical attention by an orthopedic surgeon would "probably" have given Thompson a "good chance" to recover "greater flexibility of his left

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[89] *Id.* In the instant case, the court inferred that Cayson's general physician ordered the arteriogram from Dr. Trapp or Radiology of Tupelo. *Id.*

[90] *Id.*

[91] *See supra* notes 59-78 and accompanying text.

[92] *Trapp*, 471 So. 2d at 384.

[93] *Id.* at 385.

[94] 475 So. 2d 439 (Miss. 1985)(en banc).

[95] *Id.* at 444. Thompson injured his thumb on July 8, 1979, and the following day his family physician referred him to the Southwestern Regional Medical Center for x-rays. *Id.* at 441. Dr. Clayton, the chief radiologist, examined and interpreted the x-rays and found no evidence of a dislocation or fracture. *Id.*

[96] *Id.* at 441. Thompson continued to have problems with his thumb so he returned for more x-rays four months after the initial injury. *Id.*

[97] *Id.* at 442. Ligament reconstruction was attempted by Dr. Meyer, an orthopedic surgeon, but Thompson continued to experience pain. *Id.* at 441-42. Therefore, a second operation was performed in order to fuse the joint of Thompson's thumb. *Id.* at 442.

thumb."[98] The trial court granted an instruction[99] relating this theory and the jury rendered a verdict for Thompson.[100] Clayton appealed contending that the instruction did not clearly enunciate the required causal connection and did not adequately guide the jury's deliberation concerning the measure of the injury.[101]

The Mississippi Supreme Court held that two other granted instructions on proximate cause appropriately announced the requisite causal connection.[102] However, the court also held that the language of the instruction channeling the jury's deliberation of the measure of injury invited speculation and conjecture.[103] The jury should have been directed to consider a "substantial probability" rather than a "good chance" to recover substantially greater flexibility of Thompson's thumb.[104] The court concluded that recovery is not allowed in Missis-

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[98] *Id.* at 444. Dr. Meyer asserted at trial that had he seen Thompson in July rather than four months later, the chance of a more reasonable function of the thumb would have definitely been greater. *Id.* at 442. Thompson contended that Dr. Clayton had a duty to use minimally sound medical judgment in reading the x-rays and that he had failed to do so. *Id.* at 444. Thompson also asserted that his family physician reasonably relied on Dr. Clayton's report, and thus, did not send him immediately to an orthopedic surgeon. *Id.* Thompson concluded by alleging that his damage was proximately caused by Dr. Clayton's breach of his duty because immediate medical attention by an orthopedic surgeon would probably have given Thompson a good chance of greater recovery. *Id.*

[99] *Id.* at 444. The instruction granted read as follows:

> The court instructs the jury that if you find by a preponderance of the evidence that defendant Dr. R.S. Clayton made an incorrect finding on the July 9, 1979 x-ray film of Plaintiff Michael B. Thompson, and you further find from the preponderance of the evidence that such an incorrect finding, if any, by defendant, Dr. R.S. Clayton was a result of negligence under all the circumstances of this case and that Dr. John Wood Boyd used reasonable care in relying upon Dr. R.S. Clayton's report did not refer the plaintiff to the immediate attention of an orthopedic surgeon and if you further find from the preponderance of the evidence that immediate attention by an orthopedic sureion [sic] would probably have given Michael B. Thompson a good chance to recover greater flexibility of his left thumb, then you must find for Plaintiff Michael B. Thompson.

Id.

[100] *Id.* at 441.

[101] *Id.* at 445. Dr. Clayton also challenged the court's qualification of an expert witness based upon his lack of familiarity with the standard of care applicable in McComb, Mississippi. The Mississippi Supreme Court held that the physician qualified as an expert by knowledge, skill, experience, training, or education and noted that he was familiar with the facilities and equipment available to Dr. Clayton. *Id.* at 443. Therefore, due to the retroactive application of *Hall*, qualification of the expert was proper. *Id.*

[102] *Id.* at 445.

[103] *Id.*

[104] *Id.*

sippi for the diminishment of a chance of recovery but is allowed only when the physician fails to render the required level of care and, as a result, the patient loses a reasonable probability of substantial improvement in his condition.[105]

II. "Second Impact" Cases: Recovery for Defective Design Under the Theory of Strict Liability

The Mississippi Supreme Court considered two noteworthy issues in *Toliver v. General Motors Corp.*[106] Toliver filed suit for injuries incurred when an automobile struck his Vega from the rear.[107] Upon impact Toliver's gas tank erupted and he was critically burned.[108] Toliver's complaint alleged that General Motors placed his Vega on the market in an unreasonably dangerous and defective condition; negligently failed to warn customers about the defective fuel tanks; negligently failed to recall the Vegas when it knew of their inherent danger; knowingly decided to mass produce the Vega in its defective state in order to save the expense of correcting the problem; negligently concealed knowledge of defective design from the consumers; and breached its express and implied warranties of fitness for a particular purpose.[109] The trial court dismissed the action for failure to state a claim upon which relief could be granted.[110]

On appeal, the Mississippi Supreme Court, retreating from past decisions, held that Toliver had stated a cause of action against General Motors because his injuries were proximately caused or enhanced by the alleged defective design or construction.[111] Accordingly, the court expressly overruled numerous decisions denying recovery in a second impact type case because the alleged defective design or manufacture did not proximately cause the collision.[112] Upon reconsideration

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[105] *Id.* Presiding Justice Walker dissented from the portion of the opinion remanding the case stating that the judgment should have been rendered in Dr. Clayton's favor. *Id.* (Walker, J., dissenting).

[106] 482 So. 2d 213 (Miss. 1985).

[107] *Id.* at 213.

[108] *Id.* Toliver sustained almost complete destruction of his facial features, including severe damage to his lips and partial loss of his nose, and also suffered partial loss of the use of his right hand and arm. *Id.*

[109] *Id.* at 213-14.

[110] *Id.* at 214.

[111] *Id.*

[112] *Id.; see, e.g.*, Pattillio v. Cessna Aircraft Corp., 379 So. 2d 1225, 1227 (Miss. 1980)(defendant whose wrong caused the accident is proper party defendant); Ford Motor Co. v. Simpson, 233 So. 2d 797, 798 (Miss. 1970)(court noted alleged design defect clearly did not cause initial accident); Walton v. Chrysler Motor Corp., 229 So. 2d 568,

of this issue, the court reasoned that the question of causation should be addressed to the instrumentality augmenting the injury rather than the instrumentality which caused the accident.[113] Under the court's holding in *Toliver*, automobile manufacturers now have a legal duty to design automobiles that are not unreasonably dangerous to a user.[114]

In addition to charging General Motors with negligence, Toliver asserted a strict liability claim under Section 402A of the Restatement (Second) of Torts, which Mississippi adopted in *State Stove Manufacturing Co. v. Hodges*.[115] Section 402A imposes liability on manufacturers who sell products in "a defective condition unreasonably dangerous to the user or consumer."[116] It must be the defective condition which makes the product unreasonably dangerous.[117]

When a product inadvertently becomes defective during the manufacturing process, the elements of defective condition and unreasonable dangerousness may easily be found.[118] However, as the court noted in *State Stove*, when a product is made as intended and yet is unreasonably dangerous, defective condition has no independent meaning.[119] Thus, in defective design cases, the court began to apply an "unreasonably dangerous" standard where a product was judged for its performance alone without consideration of the reasons for its designs.[120] Since the care the manufacturer exercised in designing the product was not relevant, evidence relating to the manufacturer's rationale for the particular design of the product was precluded.[121]

The *Toliver* court noted a problem with this application of section 402A.[122] The court stated that in such a case such as *Toliver*, the product would not be "defective" under *State Stove* which required that

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572 (Miss. 1969)(automobile manufacturer not liable for injuries arising from defects in automobile which did not cause accident).

[113] *Toliver*, 482 So. 2d at 214; *see also* Ford Motor Co. v. Hill, 404 So. 2d 1049, 1050-51 (Fla. 1981)(no distinction between manufacturers whose products cause injury and those whose products merely enhance injury); Brandenburger v. Toyota Motor Sales, Inc., 162 Mont. 506, 513 P.2d 268, 274 (1973)(although defective roof did not cause accident, it may constitute contributing factor in injuries).

[114] *Toliver*, 482 So. 2d at 215.

[115] 189 So. 2d 113 (Miss. 1966). For a thorough discussion of strict liability law, see Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

[116] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[117] *Id.* at comment i. The product must be more dangerous than the ordinary consumer would expect it to be. *Id.*

[118] *Toliver*, 482 So. 2d at 216.

[119] *State Stove*, 189 So. 2d at 121.

[120] *Toliver*, 482 So. 2d at 217.

[121] *Id.*

[122] *Id.*

the product leave the manufacturer in a manner other than that which was intended.[123] As to whether the product was "unreasonably dangerous," the court stated that only the performance of the product, not the care taken in design, would be at issue under the unreasonably dangerous test, and thus a jury could easily conclude that any car which erupts into flames is unreasonably dangerous.[124]

Therefore, in defective design cases such as *Toliver*, the court reasoned that the terms "defective condition" and "unreasonably dangerous" must be read together.[125] The court stated that Toliver must show that the product was defective, and that its defective condition made it unreasonably dangerous.[126] In order to prove that the car was defective, Toliver must show that the *placement* of the fuel tank was defective since consumers expect all cars to have fuel tanks.[127] Evidence of industry standards and alternative designs may be introduced.[128]

In summary, the court concluded that recovery under strict liability was possible upon proof that the Vega was in a defective condition unreasonably dangerous to the user, that the defect existed when General Motors sold the car, and that Toliver was injured by that defect.[129]

III. Qualification of Accident Reconstructionists as Experts

The Mississippi Supreme Court radically changed the manner in which attorneys will present automobile collision cases in *Hollingsworth v. Bovaird Supply Co.*[130] Overruling numerous prior decisions,[131]

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[123] *Id.* at 218.

[124] *Id.*

[125] *Id.* The court noted that the problem stems from its prior interpretation of § 402A in *State Stove* that the terms "defective condition" and "unreasonably dangerous" could be separated from each other. *Id.*

[126] *Id.*

[127] *Id.* The placement of the fuel tank would be defective if it "fell below the standard of automotive design contemplated by the user, and thus, became unreasonably dangerous to him." *Id.*

[128] *Id.* The court stated that Toliver could attempt to show that General Motors deviated from industry standards, or that alternative designs were feasible. *Id.* The court further stated that General Motors could attempt to rebutt the evidence, and that if General Motors attempted to qualify its product as unavoidably unsafe under comment k to § 402A, it would then be allowed to introduce evidence of the state of the art. *Id.*

[129] *Id.* at 219.

[130] 465 So. 2d 311 (Miss. 1985)(en banc).

[131] *E.g.*, Arrow Food Distrib., Inc. v. Love, 361 So. 2d 324, 328 (Miss. 1978)(affirming chancellor's exclusion of opinion testimony of accidentologist); Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 492, 148 So. 2d 693, 695 (1963)(admission of expert accidentologist testimony invasion of province of jury).

the court held that an accident reconstruction expert may give his opinion as to how an accident happened, the point of impact, the angle of travel, the responsibility of the parties involved, or the interpretation of photographs.[132] The court previously prohibited the testimony holding that it would invade the province of the jury.[133] In the instant case, however, the court reasoned that the judge must qualify the witness as an expert, the expert is then subject to cross-examination, and the jury may still reject the testimony.[134] The court suggested that the ruling merely allows testimony in automobile collision cases that has traditionally been allowed in other areas.[135] The jury remains the ultimate fact finder but may now be provided with potentially helpful testimony.[136]

IV. Liability of Bank Officers for Negligent Misrepresentation

In *Berkline Corp. v. Bank of Mississippi*,[137] a 1984 decision, the Mississippi Supreme Court announced for the first time the elements of a negligent misrepresentation claim.[138] The court once again es-

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[132] *Hollingsworth*, 465 So. 2d at 314.

[133] Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 492, 148 So. 2d 693, 695 (1963).

[134] *Hollingsworth*, 465 So. 2d at 314-15.

[135] *Id.* at 315; *see, e.g.*, Cain v. Mid-South Pump Co., 458 So. 2d 1048, 1050 (Miss. 1984)(expert on digging water wells); Thompson v. State, 457 So. 2d 953, 955 (Miss. 1984)(expert on handwriting); Williams v. State, 445 So. 2d 798, 803 (Miss. 1984)(expert on ballistics).

[136] *Hollingsworth*, 465 So. 2d at 315. Chief Justice Patterson dissented from Justice Dan M. Lee's majority opinion asserting that the expert testimony was properly excluded because it was for purposes of impeachment only and added nothing to the substance of plaintiff's case. *Id.* at 318 (Patterson, C.J., dissenting). He also contended that expert testimony is not needed in automobile accident cases as it is where complex and scientific matters need to be explained to the jury. *Id.* Presiding Justice Roy Noble Lee and Justices Walker and Hawkins joined the dissent. *Id.*

[137] 453 So. 2d 699 (Miss. 1984).

[138] *Id.* at 702. To recover under a negligent misrepresentation claim, the plaintiff must prove the following:

(a) A misrepresentation or omission of fact;
(b) That the representation or omission is material or significant;
(c) That in responding to the credit inquiry the bank officer failed to exercise that degree of diligence and expertise the public is entitled to expect of reasonably competent bank officers;
(d) That it reasonably relied upon the Bank's misrepresentation or omission; and
(e) That it suffered damages as a direct and proximate result of such reasonable reliance.

Id.

poused the *Berkline* elements in *Shogyo International Corp. v. First National Bank.*[139] In *Shogyo*, Winter, a bank officer, wrote a letter to Shogyo International Corporation stating that Co-Products Unlimited, Inc., had made financial arrangements with the bank for the purchase of wheel casters from Shogyo.[140] The parties had a previous business relationship where the bank had guaranteed payment to Shogyo.[141] Shogyo shipped the casters but was not paid upon presentment of the invoices to the bank.[142] Shogyo sued the bank, but the trial court, finding that the letter did not constitute a letter of credit, dismissed the suit.[143]

The Mississippi Supreme Court held that Shogyo had a claim against the bank even though the letter was not a letter of credit.[144] The court noted that a bank officer knowingly[145] stated an untrue fact, not an opinion.[146] The officer could reasonably have assumed that Shogyo would ship the casters in reliance on the misrepresentation and should have known that Shogyo could have mitigated its damages if it had been notified of the true situation.[147] Therefore, the court held that Shogyo's claim satisfied the elements of a negligent misrepresentation action, and therefore, that the bank was liable.[148]

For a further discussion of *Berkline*, see *1984 Mississippi Supreme Court Review*, 55 Miss. L.J. 155 (1985).

[139] 475 So. 2d 425 (Miss. 1985).

[140] *Id.* at 425-26. The letter stated the following: "Co-Products Limited, Inc. has made financial arrangements with us to purchase 150,000 casters at $.43 each in shipments of 50,000. It is our understanding the first shipment will arrive in June. We appreciate your working with Co-Products Limited, Inc. on this matter." *Id.* at 426.

[141] *Id.* at 425-46. Twice previously Co-Products had notified the bank of the need to order materials and credit was arranged. Winter, the bank officer, would then write a letter of guaranty to Shogyo. *Id.* at 426.

[142] *Id.* at 427.

[143] *Id.*

[144] *Id.*

[145] *Id.* Since this was a claim for negligent misrepresentation, the court's notation of the fact that Winter knew the statement was untrue would seem to relate to the bank officer's failing to exercise the degree of diligence and expertise that the public would expect. *See supra* note 138.

[146] *Shogyo*, 475 So. 2d at 427. *Berkline* clearly distinguished between facts and opinions, and stated that an expression of opinion may not be actionable. *Berkline*, 453 So. 2d at 702.

[147] *Shogyo*, 475 So. 2d at 427.

[148] *Id.* at 428. The court also noted that under the circumstances in the instant case, the bank had a duty to Shogyo to correct the previous misrepresentations before the transaction was complete. *Id.* (citing Guastella v. Wardell, 198 So. 2d 227, 230 (Miss. 1967)). For a general discussion of a bank's liability to third persons for furnishing erroneous credit information, see Annot., 77 A.L.R.3d 6 (1977).

V. Social Host Doctrine not Adopted in Mississippi

In *Boutwell v. Sullivan*,[149] the court declined to adopt the social host doctrine under which liability is imposed upon hosts who supply intoxicating liquor to persons who are, or become, intoxicated and subsequently injure a third person.[150] Deanna Boutwell, widow of Sidney Boutwell, sued Sullivan for serving beer to Branan, a guest in his home, after Branan had become visibly intoxicated.[151] Branan drove home and was involved in an accident in which Sidney Boutwell was killed.[152] The lower court held that no cause of action existed against Sullivan and dismissed the complaint.[153]

On appeal, the Mississippi Supreme Court noted that at common law it is not a tort to give intoxicating liquor to "ordinary able-bodied men."[154] The court noted that most jurisdictions follow the common law[155] although New Jersey has adopted the social host doctrine in limited situations.[156] After weighing the strong public policy against drunk driving with the problems inherent in requiring a host to control his guests' actions,[157] the court concluded that since neither statutory law nor common law imposed liability upon Sullivan in this instance, no

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[149] 469 So. 2d 526 (1985).

[150] *Id.* at 529.

[151] *Id.* at 527. Boutwell alleged that the Branans and Sullivans gathered at Sullivan's home and drank beer together until they became intoxicated, that Sullivan knew that one or more of the Branans would drive home, and that Sullivan served beer to one visibly intoxicated in violation of Miss. Code Ann. § 67-1-83 (Supp. 1985). *Boutwell*, 469 So. 2d at 527.

[152] *Boutwell*, 469 So. 2d at 527.

[153] *Id.*

[154] *Id.* at 528. The Mississippi Supreme Court also noted that Miss. Code Ann. § 67-1-83 (Supp. 1985), applies only to permittees or those under the control of permittees and does not apply to beer not containing more than four percent of alcohol by weight. *Boutwell*, 469 So. 2d at 527-28; *see* Miss. Code Ann. § 67-1-5 (Supp. 1984).

[155] *Boutwell*, 469 So. 2d at 528; *see, e.g.*, Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507, 510-11 (1983)(agreed with common law view and held that no liability can be imposed on social host who serves alcoholic beverages to adult guest); Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566, 567 (1970)(refused to abrogate common law rule that it is not a tort to sell alcoholic beverages to able-bodied men).

[156] *Boutwell*, 469 So. 2d at 529; *see* Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219, 1228 (1984)(social host doctrine applies when group is small enough so that host has some control over guests and liquor supply). For a further discussion of *Kelly v. Gwinnell*, see Note, *Torts - Negligence - Social Host Who Serves Alcoholic Beverages to Intoxicated Adult Guest Liable for Injuries Caused by Negligence of That Guest*, 54 Miss. L.J. 557, 557-70 (1984).

[157] *Boutwell*, 469 So. 2d at 529. A host may have problems regulating how much guests drink; if the guest is an employer or close friend, the host may have difficulty controlling him; differences in physical size may make control difficult. *Id.*

cause of action exists against Sullivan.[158] The court proposed that any change in the law should be addressed by the Mississippi State Legislature.[159]

VI. Conclusion

Mississippi tort law was updated and altered significantly by the Mississippi Supreme Court in 1985. The court made numerous landmark decisions in the medical malpractice area. *Hall v. Hilbun* will be frequently cited due to the court's adoption of the national standard of care for physicians.[160] Due to the court's ruling in *Reikes v. Martin*, physicians now know that they must disclose risks which would be material to a prudent patient in determining whether or not to undergo treatment, and that an objective test will be applied at trial to determine whether a reasonably prudent patient would have given consent if he had been properly informed.[161] Under the holdings of *Hardy v. Brantley* and *Trapp v. Cayson*, hospitals may now be vicariously liable for the malpractice of a physician in certain circumstances.[162] Finally, the Mississippi Supreme Court declined to adopt the theory allowing damages for the "loss of a chance of greater recovery".[163]

The Mississippi Supreme Court considered several automobile accident cases and radically changed the applicable law. In *Toliver v. General Motors*, the court allowed recovery in a second impact type case where the alleged defective design or manufacture did not proximately cause the collision, but did cause increased injury. The court also held that strict liability may be imposed in defective design cases where the automobile was in a defective condition unreasonably dangerous to the user, the defect existed when the car was sold, and the plaintiff was injured by that defect.[164] In *Hollingsworth v. Bovaird Supply Co.*, the court held that an accident reconstruction expert may give his opinion as to how an accident happened, the point of impact, the angle of travel, the responsibility of the parties involved, or the interpretation of photographs.[165]

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[158] *Id.* The court suggested that instances may exist in which liability would lie against social hosts. *Id.*

[159] *Id.*

[160] *See supra* notes 20-43 and accompanying text.

[161] *See supra* notes 44-58 and accompanying text.

[162] *See supra* notes 59-93 and accompanying text.

[163] *See supra* notes 94-105 and accompanying text.

[164] *See supra* notes 106-129 and accompanying text.

[165] *See supra* notes 130-136 and accompanying text.

Finally, the Mississippi Supreme Court once again considered the liability of bank officers for negligent misrepresentation in *Shogyo International Corp. v. First National Bank*, and followed past decisions in imposing liability.[166] The court also adhered to past law by declining adoption of the social host doctrine.[167]

The Mississippi Supreme Court took positive steps in 1985 to bring Mississippi law in line with that of other states. The court considered advancements made in science and society, as well as the underlying policies and effects of the new standards and laws adopted. As a result, the Mississippi Supreme Court handed down well-reasoned and progressive opinions in the area of tort law in 1985.

Paula Graves

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[166] *See supra* notes 137-148 and accompanying text.

[167] *See supra* notes 149-159 and accompanying text.

RECENT DECISIONS

Torts—Medical Malpractice—Negligence of Independent Contractor Physicians Who Provide Specialized Services is Imputed Vicariously to Hospitals through Apparent Agency Principles

Plaintiff[1] filed a medical malpractice action[2] in the Circuit Court of Hinds County[3] against defendants hospital[4] and emergency physician[5] for the wrongful death[6] of plaintiff's decedent.[7] Decedent died on the day following his treatment in the defendant hospital's emergency room.[8] Defendant physician's medical group[9] contracted with defendant hospital to provide complete emergency services[10] as independent

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[1] Plaintiff, Mrs. Annie Theresa Hardy, was administratrix of the estate of Brad Emmitt Ewing, her deceased son. Hardy v. Brantley, 471 So. 2d 358, 362 (Miss 1985)(en banc).

[2] *Id.* at 358. The action alleged negligent failure to diagnose and treat the decedent. *Id.*

[3] *Id.* at 362.

[4] Defendant Hinds County General Hospital, a corporate entity, operated an emergency room as one of its services. *Id.* at 360, 371.

[5] Defendant Dr. Terry K. Brantley, one of three physicians comprising The Hinds Emergency Group (HEG) was the emergency room physician on duty who diagnosed and treated decedent on his initial visit. *Id.* at 360-61.

[6] *See* Miss. Code Ann. § 11-7-13 (Supp. 1984)(Mississippi Wrongful Death Act).

[7] *See supra* note 1.

[8] *Hardy*, 471 So. 2d at 360-61. Decedent sought hospital emergency care for severe abdominal pains. *Id.* at 360. He did not seek the services of a particular emergency physician. *Id.* at 360. On the sole basis of blood pressure readings, blood tests and a scant patient history which noted that decedent worked in the hot sun prior to onset of his symptoms, the emergency physician treated decedent for heat exhaustion. *Id.* at 360-61. Physician dismissed the decedent after his pain responded to medication, but decedent returned the following day experiencing renewed pain; he died shortly thereafter. *Id.* An autopsy revealed perforated duodenal ulcer and peritonitis as the cause of death. *Id.* at 361.

[9] *See supra* note 5.

[10] *Hardy*, 471 So. 2d at 361. Under the contract HEG had sole responsibility of providing professional services for the hospital's emergency room for all patients seeking

contractors.[11] The trial court granted the motions of both defendants for a directed verdict at the close of plaintiff's case.[12] On appeal,[13] the Mississippi Supreme Court, *held*, reversed and remanded.[14] Where a hospital holds itself out as a provider of services and enters into a contractual agreement with physicians to provide such services, and where a patient in reliance on the hospital engages those services without regard to the identity of a particular physician, a hospital will be liable to the patient for the physician's negligence, if any, under the doctrine of respondeat superior. *Hardy v. Brantley*, 471 So. 2d 358 (Miss. 1985)(en banc).

Traditionally, tort remedy for patients against hospitals for the negligent acts of medical personnel was limited.[15] The principles of charitable immunity[16] and governmental immunity[17] shielded numer-

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care except those known to have private physicians. *Id.* Fees or services were determined by HEG subject to hospital review; HEG paid the hospital a fee to handle all of the group's billings and collections. *Id.* In addition, group physicians agreed to confine their practice to emergency coverage, to provide individual professional liability insurance, and to indemnify the hospital for damages caused by their negligent or intentional acts. *Id.* at 361-62.

[11] *Id.* The contract contained a disclaimer clause denoting the independent contractor status of HEG and denying any employee agency status between the two parties except in the hospital's billing and collection functions. *Id.* However, the disclaimer also stated that the hospital's sole interest and responsibility was to ensure that services of the emergency department were performed in a competent manner. *Id.* at 362.

[12] *Id.* at 363. The trial judge excluded testimony of the plaintiff's out-of-state expert medical witness. *Id.* However, plaintiff made a question and answer proffer of witness' testimony for the record. *Id.* at 364. According to the witness, the negligent failure to diagnose the deceased resulted from inadequate procedures in three areas: patient history, physical examination and testing. *Id* at 364, 367-68. Due to the procedural posture of the case, the supreme court acknowledged the pro-plaintiff slant of the facts, and noted conflicting versions of the decedent's medical history. *Id.* at 360 n.1, 361.

[13] Appeal was taken against both defendants. *Id.* at 363

[14] *Id.* at 374. The court noted that its consideration of hospital liability for negligence of independent contractor physicians was one of first impression. *Id.* at 369. Further, the court held only that the plaintiff produced sufficient evidence to submit to the jury the question of hospital liability under the new expanded doctrine of respondeat superior. *Id.* at 374 n.8. In a second ruling, the court reversed and remanded for plenary trial on the negligence issue under guidelines set forth by the new national standards for medical expert witnesses. *Id.* at 368.

[15] Comment, *Patient Recovery - A Poor Prognosis for Hospitals? The Expanding Scope of Hospital Liability*, 10 OHIO N.U.L. REV. 519, 519 (1983).

[16] Early American jurisprudence adopted the English trust fund concept of charitable immunity for hospitals applied in Feoffees of Heriot's Hosp. v. Ross, 8 Eng. Rpt. 1508 (1846). *See* McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 435 (1876)(espousing trust fund theory of immunity for hospital corporation with no stock which held all its resources in trust to sustain and increase its benefit to public). Later courts ad-

ous hospitals from liability for the tortious conduct of their employees.[18] However, patients could recover damages from private for-profit

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vanced three additional theories for charitable immunity. First, the doctrine of respondeat superior was inapplicable because the charity hospital received neither personal nor private benefit from the work of its servants. *See* Hearns v. Waterbury Hosp., 66 Conn. 98, 33 A. 595, 604 (1895)(master responsible for negligence of servant only when servant acts for benefit of master). Second, a non-paying patient was deemed to impliedly waive the liability of a charitable hospital or, in the alternative, to assume the risk for the negligence of hospital personnel. *See* Powers v. Massachusetts Homeopathic Hosp., 109 F. 294, 303 (1st Cir. 1901)(patient's acceptance of bounty of charity hospital implied agreement that charity will not be liable for its servants' administration of bounty). Finally, for public policy reasons courts found that the overall social benefit of hospitals outweighed the economic consequences to injured individuals. *See* Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 260 P.2d 765, 766 (1953)(benefits from charitable institution to afflicted persons in society offset individual hardships). *See generally* Comment, *supra* note 15, at 519-23 (discussing four theories of charitable immunity).

[17] Governmental or sovereign immunity derived from the premise that lawmakers could not be liable under the laws they created. *See* Comment, *supra* note 15, at 523.

[18] Early Mississippi cases held that a charitable hospital was liable to an injured patient only if the hospital failed to exercise due care and caution in the selection and employment of its physicians and nurses, not for the actual negligence of the employee. *See* Int'l Order of Twelve of Knights & Daughters of Tabor in Miss. v. Barnes, 204 Miss. 333, 343, 37 So. 2d 487, 489 (1948)(hospital not liable for nurse's negligent act of burning patient with hot water bottle when hospital exercised due care in employment of nurse); Pace v. Methodist Hosp., 130 So. 468, 468 (Miss. 1930)(exclusion of plaintiff's evidence presented on issue of hospital's negligence in selection of nurse); Mississippi Baptist Hosp. v. Moore, 156 Miss. 676, 687, 126 So. 465, 468 (1930)(hospital not liable for x-ray technician's failure to film break in patient's arm). Subsequently, charitable immunity was judicially abrogated in Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 940, 55 So. 2d 142, 156 (1951)(en banc), *aff'd*, 56 So. 2d 709 (Miss. 1952). In *Holmes* a laboratory technician negligently mislabeled blood types for a transfusion which resulted in a patient's death. *Holmes*, 214 Miss. at 913, 55 So. 2d at 143-44. The court, overruling its earlier decisions, held the hospital liable for the negligence of the technician to the same extent as if the hospital had negligently selected and retained the employee. *Id.* at 940, 55 So. 2d at 156.

Similarly, governmental immunity afforded to state, county, and municipal hospitals was not absolute. Waiver of immunity occurred early in some states through legislative action. *See* Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577, 578-79, 581 (1923)(upholding legislative resolution which granted ad hoc waiver of immunity for hospital's negligent release of insane patient). Until recently, Mississippi courts upheld the doctrine of sovereign immunity in hospital contexts. *See, e.g.*, McKlemurry v. University Medical Center, 380 So. 2d 251, 251 (Miss. 1980)(upholding medical center's defense of sovereign immunity); Rolph v. Board of Trustees of Forrest Co. Gen. Hosp., 346 So. 2d 377, 379 (Miss. 1977)(declaring unconstitutional special law granting county power to waive sovereign immunity as to defendant hospital). *But see* Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982). In *Pruett*, the court prospectively abolished sovereign immunity in Mississippi as it applied to the state, municipalities, and other local subdivi-

hospitals.[19] Injured patients based recovery on the agency doctrine of respondeat superior which holds the master-principal liable for the acts of his servant-agent which are committed within the scope of the latter's employment.[20] Premised on the hospital's right to control details of the employee's work, the doctrine was early applied to employee nurses of private hospitals in a number of jurisdictions.[21]

The seminal case in Mississippi affirming such application of vicarious liability is *Richardson v. Dumas*.[22] In *Richardson* a delirious patient in a private sanitarium fell to his death through an open, unscreened window.[23] The supreme court found that evidence of the nurse's failure to properly care for the patient was sufficient to present a jury question.[24] Additionally, the court distinguished between a hospital and sanitarium which operated for profit, and one which was a charitable institution, and held that the former was liable for the negligence of its employee nurses.[25] To support its holding the court cited the rule that a master is responsible for the torts of his servant committed in the scope of his employment.[26] The New York court in

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sions except for legislative, judicial and executive acts by individuals acting in their official capacity. *Id.* at 1052. The court deferred to the state legislature to enact legislation abrogating sovereign immunity and to work out details including the establishment of liability insurance programs. *Id.*

[19] *See* Gardner v. Newnan Hosp., 58 Ga. App. 104, 198 S.E. 122, 124 (1938)(hospital conducted for private gain owes patient duty of reasonable care and attention for their safety as their mental and physical condition, if known, may require).

[20] Zaremski, *Liability of a Hospital as an Institution: Are the Walls of Jericho Tumbling?*, 16 FORUM 225, 226, (1980).

[21] *E.g.*, Pensacola Sanitarium v. Wilkins, 68 Fla. 447, 67 So. 124, 124 (1914)(nurse negligently left hot water bottle in patient's bed causing burns); Broz v. Omaha Maternity & Gen. Hosp. Ass'n, 96 Neb. 648, 148 N.W. 575, 576 (1914)(negligence of staff nurses resulted in deranged patient poisoning himself).

[22] 106 Miss. 644, 64 So. 459 (1914).

[23] *Id.* at 669, 64 So. at 460.

[24] *Id.*

[25] *Id.* at 670, 64 So. at 460; *see* General Benevolent Ass'n v. Fowler, 210 Miss. 578, 583, 50 So. 2d 137, 140-42 (1951)(private hospital liable for negligent acts of employee nurse); Palmer v. Clarksdale Hosp., 206 Miss. 680, 698, 40 So. 2d 582, 586 (1949)(same); Maxie v. Laurel Gen. Hosp., 130 Miss. 246, 250, 93 So. 817, 817 (1922)(same); Meridian Sanatarium v. Scruggs, 121 Miss. 330, 336, 83 So. 532, 534 (1920)(same). In New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962), an emergency room nurse made no effort to prevent a patient from bleeding to death. *Id.* at 196, 146 So. 2d at 885-86. The court found the hospital liable for the want of ordinary care either from the breach of duty by a qualified nurse or from the incompetency of a nurse. *Id.* at 196-97, 146 So. 2d at 885-87.

[26] *Richardson*, 106 Miss. at 670, 64 So. at 460.

Schloendorff v. Society of New York Hospital,[27] however, viewed staff-employee physicians not as servants but as independent contractors whose medical expertise negated the hospital's right to control.[28] In *Schloendorff*, Justice Cardozo applied the traditional interpretation of respondeat superior to a house physician and a visiting physician, who performed surgery in the defendant non-profit hospital on a patient without her permission.[29] He reasoned that since a hospital did not undertake to act through either its staff or visiting physicians, but merely procured them to act on their own responsibility, then a hospital could not exercise any control over the professional-medical acts of physicians.[30] He concluded that respondeat superior could not be applied to impute liability to non-profit hospitals when physicians acted in their professional-medical capacity.[31] To alleviate some inequities to patients resulting from hospital non-liability, subsequent courts deemed non-profit hospitals vicariously liable for the negligent administrative acts of their staff-employee physicians, but not for their medical acts.[32] In *Necolayff v. Genessee Hospital*[33] the New York court dis-

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[27] 211 N.Y. 125, 105 N.E. 92 (1914), *rev'd*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); *see infra* note 42 and accompanying text.

[28] *Id.* at 126, 105 N.E. at 94. An independent contractor is distinguished from an employee by the employer's lack of the right of control over the former in the physical details of his work. RESTATEMENT (SECOND) OF AGENCY § 250 comment a (1958); *see also* Southwick, *Hospital Liability: Two Theories Have Been Merged*, 4 J. LEGAL MED. 1, 4-6 (March 1983)(independent physician has sole control over methods of his work; employer hospital not liable for negligence of independent contractor); Comment, *supra* note 15, at 525-26 (independent physician not bound to obey directions of hospital). Only a few aberrant cases in the 1800's applied the doctrine of respondeat superior to the employer-independent contractor relationship. *See, e.g.*, Stone v. Cheshire R.R. Corp., 19 N.H. 427, 441 (1849)(railroad liable for blasting injury to plaintiff caused by negligence of construction contractor).

[29] *Schloendorff*, 211 N.Y. at 125, 105 N.E. at 93. The patient consented to an examination for a tumor under ether but expressly forbade her physicians to perform surgery to remove the tumor. *Id.*

[30] *Id.* at 126, 105 N.E. at 94.

[31] *Id.* The *Schloendorff* court likewise held that a hospital was not liable for the negligence of nurses in the performance of professional duties over which the hospital had no right of control. *Id.*

[32] *See, e.g.*, City of Miami v. Oates, 152 Fla. 21, 10 So. 2d 721, 724 (1942)(hospital liable under respondeat superior for physician's administrative act of using electric cauterizing instrument which ignited alcohol on patient's abdomen); Fowler v. Norways Sanitorium, 112 Ind. App. 347, 42 N.E.2d 415, 420 (1942)(hospital liable for physician's administrative transfer of suicidal patient to dangerous location); Frost v. Des Moines Still College, 248 Iowa 294, 79 N.W.2d 306, 314 (1956)(hospital liable for negligent administrative act of independent contractor physician under master-servant relationship); Lewis v. Columbus Hosp., 1 A.D.2d 444, 151 N.Y.S.2d 391, 392-93 (1956)(intern's appli-

tinguished between administrative and medical acts where a hospital and a nurse administered a blood transfusion to the wrong patient.[34] Negligent administration of a transfusion to the intended patient, a medical act, vitiated hospital liability.[35] However, the court reasoned that a transfusion given with due care to the wrong patient imposed liability on the grounds that the professional nature of the act became administrative upon entrance of hospital personnel into the wrong room.[36]

Ultimately the administrative-medical dichotomy was abandoned by the New York court in *Bing v. Thuing*.[37] In *Bing*, a flammable alcohol antiseptic applied to the patient in preparation for surgery spilled on her linens.[38] A fire resulted during surgery from use of a heated electric cautery causing severe burns to the patient.[39] The trial court found the hospital liable on the premise that applying antiseptic was an administrative action.[40] The supreme court, appellate division, reversed on grounds that the duty to inspect the linens prior to surgery was a medical act.[41] The court of appeals, in overruling its earlier

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cation of incorrect fluid to treat patient's ear was medical act which did not impose liability on hospital); Roth v. Beth El Hosp., 279 A.D. 917, 110 N.Y.S.2d 583, 584 (1952)(same).

[33] 270 A.D. 648, 61 N.Y.S.2d 832 (1946), *aff'd per curiam*, 296 N.Y. 936, 73 N.E.2d 117 (1947).

[34] *Necolayff*, 61 N.Y.S.2d at 834. The two hospital employees gave the plaintiff a blood transfusion over her protests that her doctor did not intend for her to receive one. The transfusion, which had been ordered by another physician for his patient on the same floor, caused the plaintiff mental illness and necessitated treatment at a state hospital for the insane. *Id.* at 834-35.

[35] *Id.* at 836. The court stated that in giving a transfusion to the proper patient the employees did so on behalf of the physician and not of the hospital. *Id.* Thus, the act was a medical one. *Id.*

[36] *Id.* The court based its rationale on the employees' breach of a duty to protect patients which was imposed on them by their employment status. *Id.* Their failure to protect the plaintiff from the torts which they inflicted on her was an administrative act for which the hospital was liable. *Id.*

[37] 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

[38] *Id.* at 659-60, 143 N.E.2d at 3-4, 163 N.Y.S.2d at 4-5. The nurses acknowledged that they made no attempt to follow the instructions of the plaintiff's private physician to inspect the linens and change them if they became soiled by antiseptic. *Id.* at 659, 143 N.E.2d at 3-4, 163 N.Y.S.2d at 5.

[39] *Id.* at 659, 143 N.E.2d at 4, 163 N.Y.S.2d at 5. The physician reacted to a burning smell by dousing the area with water. *Id.* However, he failed to inspect linens beneath the patient with the result that the smouldering fire severely burned the patient's body. *Id.*

[40] *Id.* at 659-60, 143 N.E.2d at 4, 163 N.Y.S.2d at 5.

[41] *Id.* at 660, 143 N.E.2d at 4, 163 N.Y.S.2d at 5. Prior to *Bing*, New York courts

Schloendorff decision,[42] rejected the concept that hospitals did not undertake to treat patients through acts of their staff physicians.[43] Accordingly, the court reasoned that hospitals should be liable under the doctrine of respondeat superior for any injury occurring within the physician's scope of employment.[44]

Subsequent courts redefined vicarious liability of hospitals in terms of the relationship between a hospital and its employee physicians.[45] The Arizona court in *Beeck v. Tucson General Hospital*[46] examined an employment relationship in terms of the degree of control exercised by the hospital.[47] The court relied on numerous determina-

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exculpated hospitals for the negligent medical acts of their employee physicians and nurses. *Id.* at 658, 143 N.E.2d at 3, 163 N.Y.S.2d at 4; *see supra* note 31. The instant action asserted negligence against two hospital nurses. *Bing*, 2 N.Y.2d at 660, 143 N.E.2d at 4, 163 N.Y.S.2d at 5.

[42] *Bing*, 2 N.Y.2d at 666-67, 143 N.E.2d at 8-9, 163 N.Y.S.2d at 11-12. The court's decision applied to both employee physicians and nurses; it abrogated charitable immunity as well. *Id.; see supra* notes 27-31 and accompanying text.

[43] *Bing*, 2 N.Y.2d at 666, 143 N.E.2d at 8, 163 N.Y.S.2d at 11. The court noted that present-day hospitals employed extensive staffs of medical and administrative personnel thereby providing more than mere facilities for treatment. *Id.* The court reasoned that patients could, therefore, expect a hospital to treat them rather than expect that its physicians and nurses would act on their own responsibility. *Id.*

[44] *Id.* at 666-67, 143 N.E.2d at 8-9, 163 N.Y.S.2d at 11-12. The court pointed to the salary paid to medical personnel and to the hospital's charge for medical services as being indicative of an employment status. *Id.* at 666, 143 N.E.2d at 8, 163 N.Y.S.2d at 11.

[45] *See* Gregg v. National Medical Health Care Services, Inc., 145 Ariz. 51, 699 P.2d 925, 929 (1985)(consultation fees and mandatory attendance policy sufficiently created jury question as to whether cardiac specialist was independent contractor or part-time employee); Hollingsworth v. Georgia Osteopathic Hosp., 145 Ga. App. 870, 245 S.E.2d 60, 61-62 (hospital's compensation to physician and mandatory attendance policy were sufficient evidence of employment relationship to establish fact question for jury), *aff'd*, 242 Ga. 522, 250 S.E.2d 433 (1978); Overstreet v. Doctors Hosp., 154 Ga. App. 896, 237 S.E.2d 213, 214 (1977)(salaried position of emergency services director-physician and hospital control of departmental policies not sufficient evidence of employment relationship).

[46] 18 Ariz. App. 165, 500 P.2d 1153 (1972).

[47] *Beeck*, 500 P.2d at 1157-58; *see also* Brown v. La Societe Francaise de Bienfaisance Mutuelle, 138 Cal. 465, 475-76, 71 P. 516, 516-17 (1903)(vicarious liability imputed to hospitals when patient sought treatment primarily from hospital and hospital paid salary to physician); Bilonoha v. Zubritzky, 233 Pa. Super. 339, 136 A.2d 351, 354 (1975)(hospital's ownership of surgery facilities and equipment indicated control over physician). Additionally, the *Beeck* court considered an enterprise theory to find an agency relationship between the hospital and its radiologists. *Beeck*, 500 P.2d at 1158. The court noted that the physicians provided services as an integral part of the total hospital function or enterprise. *Id.; see also* Hannola v. City of Lakewood, 68 Ohio App. 2d 61, 426 N.E.2d 1187, 1190 (1980)(emergency room was integral part of full-service

tive tests of control including payment of a salary to the physician, a written agreement by which the physician rendered exclusive services to the hospital, hospital provision of equipment, and patient appointment and billing services for the physician.[48] The court concluded that the hospital's significant control over its staff radiologist negated an express disclaimer of the physician's employee or agent status.[49] By contrast, in the absence of control criteria establishing employment or actual agency, some courts refused to impose liability on hospitals for the negligence of their contract-physicians.[50]

Other courts, however, shifted to an apparent agency rationale[51] to impute vicarious liability to hospitals which impliedly represented con-

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hospital); Adamski v. Tacoma Gen. Hosp., 20 Wash. App. 98, 579 P.2d 970, 977 (1978)(emergency physician performed inherent function necessary for hospital to achieve its purpose).

[48] *Beeck*, 500 P.2d at 1157-58. In *Beeck* the plaintiff contracted pneumonia from extravasion of dye in her spine which occurred when an x-ray machine struck the needle during a lumbar myelogram. *Id.* at 1154. The hospital had a five-year contract with two radiologists, co-chairmen of the hospital department, one of which was the negligent physician at defendant hospital. *Id.* at 1157. The contract stipulated a percentage of monthly gross revenue as salary for the physicians, allocated vacation and professional education times, forbade private practice and required provision of malpractice insurance by each physician. *Id.* at 1157-58. In addition the hospital provided rent-free facilities and equipment, furnished supplies, hired x-ray technicians, and billed for the physicians' services. *Id.* at 1158. The court found further evidence of hospital control in the physician's position as department co-chairmen and in the requirement that he comply with hospital regulations and policies. *Id.* at 1157-58. In addition the court noted that the contractual agreement between the hospital and the radiologists gave the latter a monopoly on the facility's x-ray services; therefore, the patient had no choice of radiologists to perform her myelogram. *Id.* at 1158.

[49] *Id.* at 1159. The disclaimer was contained in a medical-surgical consent form signed by the plaintiff prior to admission to the defendant hospital. *Id.*

[50] *E.g.*, Johnson v. St. Bernard Hosp., 79 Ill. App. 3d 709, 399 N.E.2d 198, 203 (1979)(hospital not vicariously liable for negligence of emergency room physician who was independent contractor not salaried by hospital); Zaremski, *supra* note 20, at 228; *see also* Strodel, *Ostensible Agency - Piercing the Veil of Hospital-Physician "Independent" Contracts*, PERSONAL INJURY DESKBOOK 326, 326-30 (1984)(avenues to circumvent independent contractor defense used by hospitals).

[51] *See* Strodel, *supra* note 50, at 326-30. The apparent or ostensible agency doctrine is found in the Restatement of Agency:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

tract-physicians as employees.[52] In *Adamski v. Tacoma General Hospital*,[53] the Washington court articulated this ostensible agency rationale as a "holding out" theory.[54] The hospital in *Adamski* offered

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[52] In Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955), the court found an apparent agency relationship between the hospital and an independent contractor anesthesiologist based on the hospital's representation to the public that the contract physician who provided services was an employee. *Seneris*, 45 Cal. 2d at 822-23, 291 P.2d at 926-27. A number of courts have since relied on this rationale. *See, e.g.*, Brown v. Moore, 247 F.2d 711, 719-20 (3d Cir. 1957)(hospital representations that its medical director, neuro-psychiatrist was employee preempted his independent contractor status), *cert. denied*, 355 U.S. 882 (1957); Marek v. Professional Health Services, Inc., 179 N.J. Super. 433, 432 A.2d 538, 543 (1981)(hospital could not delegate its duty of care to read patient's x-rays to independent contractor radiologist and was vicariously liable for his negligence); Nduba v. Benedictine Hosp., 52 A.D.2d 450, 384 N.Y.S.2d 527, 529 (1976)(hospital which held itself out as furnishing complete emergency services could not deny agency of independent contractor physicians on basis of secret contractual limitations); *cf.*, Webb v. Priest, 413 So. 2d 43, 47 (Fla. Dist. Ct. App. 1982)(extending apparent agency doctrine to physicians even though employed by physicians' organization and not by hospital); Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 255-56 (Ky. 1985)(extending apparent agency to private physician who performed emergency service as staff physician on call); Williams v. St. Claire Medical Center, 657 S.W.2d 590, 595-96 (Ky. Ct. App. 1983)(extending apparent agency to independent contractor nurse-anesthetists).

The apparent agency rationale was adopted by courts mindful of the public policy need to assure that an injured patient was not denied recovery from the hospital because the negligent physician was an independent contractor rather than an employee. *E.g.*, Hannola v. City of Lakewood, 68 Ohio App. 2d 61, 426 N.E.2d 1187, 1190 (1980)(public policy demanded hospital not be allowed to contractually insulate itself from negligence of emergency physicians); *see infra* note 66 and accompanying text; *see also* Comment, *supra* note 15, at 545-46 (public policy was factor in not permitting hospital to insulate itself). Innovations in the health care field resulted in hospitals offering expanded, comprehensive services to the public. *See* Southwick, *supra* note 28, at 7-8. Hospitals contracted with independent physicians to provide specialized services primarily in the fields of emergency care, radiology, anesthesiology, and pathology. *See* Strodel, *supra* note 50, at 326.

[53] 20 Wash. App. 98, 579 P.2d 970 (1978).

[54] *Adamski*, 579 P.2d at 977. The court stated that a "holding out" arose when the hospital acted or omitted to act in a manner which led the patient to a reasonable belief that he was being treated by a hospital employee. *Id.* at 979. The *Adamski* court applied a three-pronged test for ostensible agency articulated in Stanhope v. Los Angeles College, 54 Cal. App. 2d 141, 128 P.2d 705 (1942):

> [First] [t]he person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person in relying on the agent's apparent authority must not be guilty of negligence.

Adamski, 579 P.2d at 978 (quoting Stanhope v. Los Angeles College, 54 Cal. App. 2d 141, 128 P.2d 705, 708 (1942)). The court noted that hospital culpability could be based on the "holding-out" theory when actual agency of physicians was absent. *Adamski*, 579

emergency room care as part of its services.[55] In so doing, the court reasoned that the hospital held itself out as the provider of this service although the service was in reality provided through a contractual agreement with a physician's emergency care group.[56] Upon admittance for emergency treatment,[57] plaintiff was unaware of the independent contractor status of his treating physician.[58] The court noted that it appeared that plaintiff was not advised to the contrary and, in fact, could reasonably assume, based on the hospital's representations, that the emergency physician was an employee of the hospital.[59] Further, the court found that the hospital's liability was not negated by the absence of proof that the institution affirmatively misrepresented the status of the emergency physician.[60] In contrast to the *Adamski* approach to a patient's lack of notice regarding the independent contractor status of an emergency care physician,[61] the Ohio Court of Appeals in

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P.2d at 977; *cf.* Levin, *Hospital's Liability for Independent Emergency Room Service*, 22 SANTA CLARA L. REV. 791, 799-801 (1982)(discussing ostensible agency doctrine as separate theory of liability rather than as extension of respondeat superior).

Capan v. Divine Providence Hosp., 287 Pa. Super. 364, 430 A.2d 647 (1980) deemed the *Adamski* "holding-out" theory to be only one of two factors on which ostensible agency could be based. *Capan*, 430 A.2d at 649. The *Capan* court identified the second element as the reliance of the patient on an institution rather than an individual physician for care. *Id.*

[55] *Adamski*, 579 P.2d at 972. The hospital contracted with Tacoma Emergency Care Physicians, Inc., (TECP), a group of five physicians, to supply the hospital with emergency room coverage on a twenty-four hour basis. *Id.* The defendant physician was a member of TECP. *Id.*

[56] *Id.* The contract denominated the physicians as independent contractors and not agents or employees of the hospital. In addition it prohibited the physicians from engaging in private practice, guaranteed them a stipulated amount monthly, outlined procedures and fees for billing-collection services by the hospital, and required both parties to procure insurance. *Id.* at 972-73.

[57] *Id.* at 971. The plaintiff sustained a compound fracture of a finger playing basketball. He forced the bone back into position prior to seeking emergency care at defendant hospital. Subsequent to treatment the plaintiff developed a staphylococcus infection which required surgery. *Id.* at 971-72.

[58] *Id.* at 979. The court interpreted printed follow-up instructions provided to the patient as evidence that the hospital treated him through its agent physician. *Id.* The instructions invited the patient to call the emergency department for further aid if he was unable to reach his personal physician. *Id.* at 971-72.

[59] *Id.* at 979; *see* Arthur v. St. Peters Hosp., 169 N.J. Super. 575, 405 A.2d 443, 447 (1979)(court may take judicial notice that patients generally assume employee status of physician absent notice to contrary).

[60] *Adamski*, 579 P.2d at 979. The hospital argued that no agency was created if the hospital had not informed the patient that he was being treated by an employee. *Id.*

[61] *See supra* notes 58-60 and accompanying text.

Hannola v. City of Lakewood[62] stated that a patient's notice or lack thereof was irrelevant in emergency circumstances.[63] The court acknowledged that the choice of a patient seeking routine medical treatment might be influenced by his knowledge that no agency existed between hospital and physician.[64] However, the *Hannola* court noted that many persons in medical crisis situations have no meaningful choice of facility, but must turn to their local hospital emergency room and its physicians for care.[65] The court concluded that public policy mandated that a full-service hospital which provided emergency room services to the public be estopped from contractually insulating itself from liability for its emergency physicians.[66] Other courts remained re-

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[62] 68 Ohio App. 61, 426 N.E.2d 1187 (1980).

[63] *Id.* at 1190. The court denoted its theory of liability as agency by estoppel which results when one has been led to rely to his detriment on an appearance of agency. *Id.*; *see* Smith v. St. Francis Hosp., Inc., 676 P.2d 279, 282-83 (Okla. Ct. App. 1983)(applying estoppel principles to emergency room physician). The *Hannola* plaintiff alleged that negligent treatment by the defendant hospital's emergency physician resulted in the death of her husband. *Hannola*, 426 N.E.2d at 1188. The hospital denied liability on the grounds that no right of control existed, no independent duty to prevent malpractice of the emergency physician existed, and that contractual arrangements exculpated liability. *Id.* at 1188-89, 1192.

The contract agreement between Lakewood Hospital and the emergency physicians' group, West Shore Medical Care Foundation, contained a provision that the hospital would not be liable for the negligent acts or omissions of the physicians. *Id.* at 1189. The Foundation billed directly for its services but its physicians were required to obtain hospital staff privileges subject to revocation for cause upon recommendation of the medical staff. *Id.* at 1189, 1192. Moreover, the contract gave the hospital final approval on patient care policies established by the Foundation. *Id.* at 1192. The court cited the hospital's control over staff privileges and patient care policies as sufficient evidence to overrule the lower court's summary judgment for the hospital and city on the issues of the hospital's right to control and its independent duty to prevent malpractice. *Id.* at 1191-93.

[64] *Hannola*, 426 N.E.2d at 1190.

[65] *Id.* The court stressed that in crisis situations people are highly emotional and time is of the essence. *Id.*; *cf.* Capan v. Divine Providence Hosp., 287 Pa. Super. 364, 430 A.2d 647, 649 (1980)(societal changes meant patient was more likely to look to hospital for care than to individual physician). The *Hannola* court stressed that hospital culpability lay as well in a patient's reliance on the excellent reputation of a facility. *Hannola*, 426 N.E.2d at 1191. The instant plaintiff and her deceased husband chose the defendant's emergency room because of its reputation for the highest quality emergency care. *Id.*

[66] *Hannola*, 426 N.E.2d at 1190. The court cited both an emergency patient's lack of choice and a hospital's public representations as the bases for its estoppel rationale. *Id.* Additionally, the court noted that hospitals themselves cultivate their full-service image through advertising and varied community relations programs. *Id.*; *see also* Smith v. St. Francis Hosp., Inc., 676 P.2d 279, 283 (Okla. Ct. App. 1983)(secret contractual limitations of liability unknown to patient did not overrule hospital's conduct and representation of agency).

luctant to extend liability under respondeat superior and agency doctrines for the negligence of independent contractor physicians when a physician-patient relationship existed prior to occurrence of the negligent act.[67]

Some jurisdictions eschewed altogether the employment relationship with physicians, either actual or ostensible, and imposed direct liability on hospitals under the doctrine of corporate negligence.[68] Unlike the vicarious liability of respondeat superior, hospitals were found to be directly liable for breach of a non-delegable duty of care owed to the patient.[69] Courts extended hospital liability to all physicians practicing within its facility on two bases: the duty to use reasonable care in supervision of physicians,[70] and the duty to use reasonable care in

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[67] *E.g.*, Trapp v. Cayson, 471 So. 2d 375 (Miss. 1985)(en banc). In its *Trapp* decision, handed down the same day as *Hardy*, the Mississippi Supreme Court applied the corollary holding of *Hardy* to determine that no agency relationship existed between co-defendants hospital and physician. *Id.* at 384-85. The corollary states that a hospital will not be vicariously liable for the negligence of an admitting physician whose services were engaged by the patient. *Id.* at 385. The *Trapp* court determined that although the defendant radiologist was engaged by the plaintiff's private physician to perform an arteriogram, the plaintiff did have a choice of radiologists. *Id.* at 384. The defendant was a member of a radiology group in private practice over which the defendant hospital had no control other than through the credentialing process. *Id.* The hospital paid no compensation to group physicians and notified patients upon admission that the radiologists billed separately for their services. *Id.; see also* Revitzer v. Trenton Medical Center, Inc., 118 Mich. App. 169, 324 N.W.2d 561, 563 (1982)(plaintiff's family physician was not agent of medical center from which he rented office space); Wilson v. Stilwill, 411 Mich. 587, 309 N.W.2d 898, 906 (1981)(independent patient-surgeon relationship prior to hospital treatment negated agency by estoppel); Weldon v. Seminole Mun. Hosp., 709 P.2d 1058, 1061 (Okla. 1985)(hospital not liable under respondeat superior or ostensible agency for negligent acts performed in emergency room by family physician).

[68] The seminal case for hospital corporate negligence, Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966), founded liability on the hospital's duty to use reasonable care in supervising physicians. *Darling*, 211 N.E.2d at 256. In *Darling*, the improper application of a leg cast by an on-call emergency physician caused gangrene and the eventual amputation of the patient's leg. *Id.* at 255. The court held that the hospital breached a duty to the patient which required the attending physician to consult with surgical staff physicians and to review the treatment rendered. *Darling*, 211 N.E. 2d at 256; *see also* Comment, *supra* note 15, at 532-33 (discussing corporate negligence).

[69] Southwick, *supra* note 28, at 17. This duty extended hospital liability to the negligent acts of private physicians. *See* Note, *Tort Law - Corporate Negligence of Hospitals and the Duty to Monitor and Oversee Medical Treatment* - Bost v. Riley, 17 WAKE FOREST L. REV. 309, 316 (1981). The author posited that without potential liability for private physicians, hospitals possibly would have no incentive to monitor physicians' practice. *Id.* at 316.

[70] *See* Fridena v. Evans, 127 Ariz. 516, 622 P.2d 463, 466 (1980)(hospital must have

the selection and retention of staff physicians.[71] In *Porter v. Pandey*,[72] the Mississippi Supreme Court declined to hold a county hospital liable for the negligent failure to supervise a staff physician in her diagnosis and treatment of the plaintiff's decedent.[73] The court found that

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actual or constructive knowledge of medical procedures before duty to supervise arose); Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253, 256 (1965)(hospital had duty to use reasonable care in supervising physicians), *cert. denied*, 383 U.S. 946 (1966); Bost v. Riley, 44 N.C. App. 638, 262 S.E.2d 391, 396 (1980)(concept of corporate negligence for failure to monitor medical treatment prescribed and administered by physicians within hospital), *cert. denied*, 269 S.E.2d 621 (1980). *But cf.* Weldon v. Seminole Mun. Hosp., 709 P.2d 1058, 1061 (Okla. 1985)(no duty on hospital to supervise care rendered by private physician in emergency room when patient not subsequently admitted to hospital).

Peer review committees composed of medical and administrative personnel assumed the task of supervision under *Joint Commission on Accreditation of Hospitals* guidelines. *See* Note, *supra* note 69, at 319. Effective supervision required that supervising authority always be present or reasonably available to monitor physician performance including the areas of consent, medication, progress notes and consultations. Hollowell, *Does Hospital Corporate Liability Extend to Medical Staff Supervision?*, 32 DEF. L.J. 203, 205-06 (1983). Courts take differing views of the limitations resulting from a hospital's actual or constructive knowledge concerning a physician's incompetence. *See* Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335, 343-44 (1972)(hospital had knowledge based on its previous joinder in another medical malpractice action against negligent physician); Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253, 258 (1965)(hospital's failure to review physician's treatment after nurses reported gangrenous condition was sufficient evidence of breach of duty to supervise), *cert. denied*, 383 U.S. 946 (1966). *But cf.* Hull v. North Valley Hosp., 159 Mont. 375, 498 P.2d 136, 143-44 (1972)(information about physician's incompetence known to hospital staff but not communicated to hospital administrator was not sufficient notice).

[71] *E.g.*, Johnson v. Misericordia Community Hosp., 99 Wis. 2d 708, 301 N.W.2d 156, 172-74 (1981)(hospital breached duty to exercise due care in selection of physicians when it failed to uncover negligent surgeon's misrepresentations as to previous staff privileges and certification). *See generally* Kaufman, *The Hospital—Medical Staff Marriage—New Stresses on Old Strains*, 19 TRIAL 75, 75-77 (May 1983)(hypothesizing five scenarios exemplary of legal obligations of hospitals and medical staff to patients). Applications of corporate liability to hospitals for the negligence of physicians within its facilities has been criticized as ignoring the procedural-organizational realities of hospital administration and medical practice. One proposal would shift liability from hospitals, or alternatively their entire medical staffs, to only those medical committee members responsible for actual assessment of staff credentials and evaluation of clinical performance. Comment, *Piercing the Doctrine of Corporate Hospital Liability*, 17 SAN DIEGO L. REV. 383, 396-99 (1980).

[72] 423 So. 2d 126 (Miss. 1982), *rev'd*, 471 So. 2d 358 (Miss. 1985).

[73] *Porter*, 423 So. 2d at 126-27. Dr. Shanti Pandey admitted the plaintiff's son to Jefferson County Hospital suffering from nausea and shortness of breath. *Id.* at 126. When the boy failed to improve after prescribed x-ray and drug treatment, his mother insisted upon his transfer to another hospital. *Id.* Shortly thereafter the boy underwent emergency surgery for a ruptured appendix. *Id.* During surgery he died of cardiac arrest.

supervising a physician's diagnosis and treatment of a patient would require the hospital to engage in the practice of medicine,[74] and that statutory authority provides that a license to practice medicine may only be issued to a duly qualified "person."[75] Therefore, since a hospital could not be licensed to practice medicine, the court was unwilling to impose a duty to supervise physicians using hospital facilities.[76] The *Porter* court did not consider hospital culpability under the doctrine of respondeat superior because the plaintiff affirmatively averred that vicarious liability was not an issue.[77]

In the instant case, the Mississippi Supreme Court stated that since it had relied on agency principles when applicable in prior nonmedical decisions, then it could extend those principles to establish the apparent agency of independent contractor physicians providing specialized services for hospitals.[78] The court reasoned that because hospi-

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Id. The plaintiff's suit was settled as to Dr. Pandey and the other physician defendants. *Id.*

[74] *Id.* at 127. The court stated that imposition of a duty to second-guess the diagnosis and treatment of a patient's private physician would be tantamount to requiring the hospital to practice medicine. *Id.*

[75] *Id.; see* MISS. CODE ANN. §§ 73-25-1 to -39 (Supp. 1978)(State Board of Licensure examines individual applicants and subsequently licenses those who are qualified). The court noted that hospitals were not authorized to engage in the practice of medicine. *Porter*, 423 So. 2d at 127.

[76] *Porter*, 423 So. 2d at 127. The court overruled the rationale but not the holding of *Porter* in its *Hardy* decision. *Hardy*, 471 So. 2d at 373. Eschewing its *Porter* rationale as bootstraps logic, the court drew two analogies to conclude that imposition of a duty to supervise physicians did not require a hospital to practice medicine. *Id.* The court referred to New Biloxi Hosp. v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962), in which it had held a hospital liable for the negligence of its emergency room nurse. *Hardy*, 471 So. 2d at 373. The court reasoned that since hospital liability was imposed in *New Biloxi Hospital* even though the facility could not be licensed as a registered nurse, then a hospital could likewise be liable for a staff physician without a license to practice medicine. *Hardy*, 471 So. 2d at 373. In a second analogy the *Hardy* court noted MISS. CODE ANN. § 79-9-1 (1972), which provides that a professional corporation shall be liable to the full extent of its property for the negligence of its members incurred while rendering professional services. *Hardy*, 471 So. 2d at 373. The court stated that a professional medical corporation could no more be licensed to practice medicine in Mississippi than could a hospital. *Id.* Moreover, the court concluded that the imposition of liability on either entity did not require either to practice medicine in violation of the state statute. *Id.*

[77] *Porter*, 423 So. 2d at 127. Plaintiff's sole theory of liability was corporate negligence. *Id.*

[78] *Hardy*, 471 So. 2d at 370-71. The court justified extension of its long-established principles of apparent authority to hospitals on grounds that hospitals held themselves out as full healthcare providers. *Id.* at 371. The court observed that advertising of services by hospitals indicated a new trend away from the hospital's original function as

tals held themselves out to the public as providers of quality health care services, a patient who sought those services without regard to the identity of a particular physician could reasonably assume that a hospital was responsible for the services it rendered.[79] The court reasoned further that hospitals, by their public representations, induced patients to believe that they provided services through physician employees, and, therefore, that hospitals created a relationship of principal-apparent agent between themselves and their independent contractor physicians.[80] In addition, the court held that a patient could reasonably believe that the specialty physicians provided services as agents of a hospital, and thus, a hospital was estopped from denying agency on the basis of a secret contractual agreement which denoted the physicians as independent contractors.[81] The court concluded that since a hospital could not deny the agency relationship of its contract physicians, then a hospital was liable under the doctrine of respondeat superior when the physicians rendered services in a negligent manner.[82]

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merely a provider of physical facilities in which physicians may practice. *Id.*

The court premised vicarious liability on three general principles. *Id.* First, the hospital must hold itself out to the public as providing a given service. *Id.* Second, the service must be provided by independent contractor physicians under contractual agreement with the medical facility. *Id.* Finally, the patient must look to the hospital, not the particular physician, as provider of the services. *Id.*

[79] *Id.* The court relied on the reasoning of RESTATEMENT (SECOND) OF TORTS § 429 (1966) which provides:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Id. at 370.

[80] *Hardy*, 471 So. 2d at 371. Additionally, the court rejected defendant hospital's argument that imposition of liability based on apparent agency was unjust when the hospital had contractually forfeited its right of control over HEG. *Id.* at 372. The court pointed to that portion of the instant contract placing sole responsibility for complete emergency service on the hospital. *Id; see supra* note 11. However, the right of hospitals vis-a-vis physicians to contractually allocate responsibilities and risks regarding services remained viable, the court stated. *Hardy*, 471 So. 2d at 372.

[81] *Hardy*, 471 So. 2d at 371. The court pointed out the anomaly of protecting the hospital from loss for negligently rendered emergency services while allowing it to benefit from services well rendered. *Id.*

[82] *Id.* By way of contrast the court further stated that a hospital would not be vicariously liable for the negligence of an admitting physician on staff who was engaged directly by the patient. *Id.; see supra* note 67 and accompanying text. The court acknowledged its awareness of the trend in other states to adopt a corporate negligence theory of hospital liability. *Hardy*, 471 So. 2d at 371 n.6; *see supra* notes 68-71 and accompanying

In a brief dissent, Justice Dan M. Lee opposed expanding hospital liability.[83] He reasoned that since increased liability would have a negative impact on the costs and availability of health services, then negligence of independent contractor physicians should not be imputed to hospitals.[84]

With the supreme court's decision in *Hardy*, Mississippi has vastly expanded the liability of hospitals for negligent acts committed within their facilities by medical professionals. Mississippi now applies respondeat superior to impute liability to hospitals for the negligent acts or omissions of both employee physicians and nurses in private and charitable hospitals.[85] Government hospitals will be in a similar situation when the Mississippi legislature finalizes details for the orderly abolition of sovereign immunity.[86] In *Hardy*, the court extended the respondeat superior doctrine to estop hospitals from denying the ostensible agency of independent contractor emergency physicians.[87] However, the holding of the court does not limit application of the doctrine merely to emergency departments;[88] rather, it extends liability to a hospital which holds itself out as providing a *given* service.[89] Thus, the ruling appears to leave open for future clarification the question of whether a hospital's public representation of itself as a full-service institution in general terms, rather than in specific areas, will render it liable for all specialized contract departments within its framework.[90]

Additionally, it is still unclear whether sufficient notice to patients of the independent contractor status of physicians in specialized departments will absolve hospitals from liability.[91] Factors controlling in

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text. In *Hardy*, the court did not address the applicability of corporate negligence in Mississippi, but stated that the doctrine better addressed the negligence of a private physician who was merely on staff at a hospital. *Hardy*, 471 So. 2d at 372, n.6.

[83] *Hardy*, 471 So. 2d at 374 (Lee, Dan, J., dissenting). Additionally, Justice Lee expressed dissent to the overruling of the *Porter* rationale. *Id.*

[84] *Id.* Presiding Justice Walker joined Lee in dissent and additionally dissented over the new expert testimony rule adopted in Hall v. Hilbun, 466 So. 2d 856, 874-75 (Miss. 1985), and its application in the instant case. *Hardy*, 471 So. 2d at 374 (Walker, P.J., dissenting).

[85] *See supra* note 18 and accompanying text.

[86] *Id.*

[87] *Hardy*, 471 So. 2d at 371.

[88] *Id.*

[89] *Id.* Specifically, the court holds "[w]here a hospital holds itself out as providing a *given* service, in this instance, emergency services . . . ," the court will extend liability. *Id.* (emphasis added).

[90] Other jurisdictions have interpreted liability under the "holding-out" theory for numerous specialty departments. *See supra* notes 52, 54, 63 and accompanying text.

[91] *See supra* notes 59, 60, 64 and accompanying text.

other jurisdictions which have adopted the ostensible agency or agency by estoppel theories will likely influence the Mississippi court in its resolution of these issues. Pertinent factors include the degree of crisis under which the patient sought care,[92] the choice of physicians available to the patient,[93] and the provision of space and equipment by the hospital for the specialty department.[94]

The significance of *Hardy* is not limited, however, to its expansion of hospital liability through the doctrine of apparent agency. The *Hardy* court's overruling of the rationale of *Porter v. Pandey*[95] sets the stage for application of corporate negligence to Mississippi's medical facilities.[96] Whether or not the court ultimately imposes a direct duty on hospitals to protect their patients from malpractice, the instant extension of hospital liability is certain to have a major economic impact on the health care industry.[97] The economic factor alone, however, is not sufficient reason to deny patients' recovery from hospitals. Public policy now dictates that economic consequences to injured patients outweigh the financial detriment to hospitals.[98] Therefore, prudent policy will behoove hospitals to alleviate costly malpractice claims possibly through application of stringent selection and supervision criteria,[99] and indemnity agreements with both independent contractor and private on-staff physicians.[100] Additionally, the court, by carefully delineating the criteria under which it will impose liability on hospitals through the doctrines of either apparent agency or corporate negligence, can stay attuned to a realistic balance between the rights of individual patients and those of collective patients on whom increased health care costs may impose intolerable burdens.

Marian Sykes Alexander

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[92] *See supra* notes 63, 65 and accompanying text.

[93] *See supra* note 48 and accompanying text.

[94] *Id.*

[95] *See supra* note 76 and accompanying text.

[96] However, the court did not take the opportunity to address corporate negligence in its *Trapp v. Cayson* decision which was handed down the same day as *Hardy* although the privately-engaged physician scenario was present. *See supra* note 67.

[97] Justice Dan M. Lee, in his dissent, opposed expanded liability for economic reasons. *See supra* note 83 and accompanying text.

[98] *See supra* note 52 and accompanying text. By contrast, public policy in the charitable immunity era was pro-hospital. *See supra* note 16.

[99] *See* Note, *supra* note 69, at 326.

[100] *See supra* note 80.

Landlord-Tenant—Application of the Implied Warranty of Habitability to All Residential Leases is not Dependent Upon Existence of Building Codes

Plaintiff[1] filed suit in the Circuit Court of Champaign County, Illinois, to recover unpaid rent[2] from defendants,[3] who occupied a triplex unit owned by plaintiff. Defendants raised several affirmative defenses[4] and counterclaimed for damages[5] that had resulted from an alleged breach[6] of the implied warranty of habitability.[7] The circuit court entered judgment in favor of the plaintiff[8] and denied defendants' counterclaim based on the implied warranty of habitability.[9] The Illinois

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[1] Plaintiff was Merwin O. Glasoe, the landlord. Glasoe v. Trinkle, 107 Ill. 2d 1, 479 N.E.2d 915 (1985).

[2] *Glasoe*, 479 N.E.2d at 916. On October 17, 1971, defendants vacated their rental unit without paying back rent. *Id.* The rental amount sought covered the months of July through October, 1981, for a total of $960. *Id.*

[3] Defendants were Jerry and Diane Trinkle, former tenants of the plaintiff. *Id.*

[4] *Id.* The defendants raised the affirmative defenses of constructive eviction, failure of plaintiff to make repairs, breach of implied warranty of habitability and failure of plaintiff to return security deposit. *Id.* at 916-17.

[5] *Id.* at 916. The defendants claimed that because the unit was in an uninhabitable condition, the proper rental value was only 60 percent of the agreed rental. *Id.* Testimony showed that the unit had an irreparable heating system, sewage leaks throughout the ceilings, cockroach and rodent infestation and an exposed sewage ditch in the front yard. *Id.* With the counterclaim, the defendants sought to recover the difference between the rent they actually paid and the proper rental value, plus replacement costs for furniture damaged by sewage leaks and increased utility bills that resulted from the defective heating system. *Id.*

[6] *Id.* at 916. To measure a breach of the implied warranty, the court declared that a substantial defect must have existed which rendered the premises unsafe or unsanitary and thus unfit for occupancy in the eyes of a reasonable person. *Id.* at 920.

[7] *Id.* at 916. In delineating the standards of the implied warranty of habitability, the court held that the warranty required a dwelling to be fit for its intended use, to be habitable and fit for living, and to contain no latent defects in vital facilities at the inception of the lease. *Id.* at 919-20. The warranty also provided that the premises would remain habitable throughout the lease term. *Id.* at 920.

[8] *Id.* at 916. The court awarded the plaintiff $152.69 after deducting various credits granted the defendants from the $960 of back rent. *Id.* The credits included damages for constructive eviction, refund of security deposit, and miscellaneous costs incurred. *Id.* at 917-18.

[9] *Id.* at 916. Since there was no city building code that applied to rental housing, the circuit court found that an implied warranty of habitability could not be raised as an affirmative defense or counterclaim. *Id.* at 918.

Appellate Court affirmed the judgment.[10] On appeal, the Supreme Court of Illinois, *held*, affirmed in part,[11] reversed in part,[12] and remanded.[13] Where there is a lease agreement between landlord and tenant, an implied warranty of habitability applies regardless of the existence of housing and building codes. *Glasoe v. Trinkle*, 107 Ill. 2d 1, 479 N.E.2d 915 (1985).

In fifteenth century feudal England, the lease was first recognized as a conveyance of real property,[14] and subsequent landlord-tenant law strictly adhered to the principles of caveat emptor.[15] Prospective tenants were given ample opportunity to inspect the property and were thereafter presumed to take the property irrespective of its state of

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[10] *Id.* at 916. The defendants appealed that portion of the judgment which dismissed their affirmative defense and counterclaim for damages that resulted from a breach of the implied warranty of habitability. *Id.* at 916.

[11] *Id.* at 922. The Illinois Supreme Court affirmed the balance of the circuit court judgment for the plaintiff in the amount of $152.69. *Id.* at 918.

[12] *Id.* The supreme court reversed the lower court's findings that the implied warranty of habitability was inapplicable absent an enacted building code. *Id.* at 918.

[13] *Id.* at 916. In remanding, the court ordered the circuit court to determine whether a breach of the implied warranty of habitability occurred and provided guidelines to consider in making this determination. *Id.* at 922. These guidelines included the nature of the deficiency, its effect on the habitability of the premises, the age of the structure, the amount of rent, the location of the premises, whether the tenant waived the defects, and whether the defects resulted from abnormal use by the tenant. *Id.* at 920. If a breach of the implied warranty was found, the court proposed that the difference in value method, computed as the difference between the fair rental value of the premises as warranted and the fair value of the premises in the defective condition, be applied to measure damages. *Id.* at 921.

[14] SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 1.1 (1980); *see* 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952)(historical treatment of lease). In the civil law, the nature of the lease was always a contract. *Id.* Prior to 1499, the common law courts treated leases as contracts which did not entitle the tenant to bring possessory actions. *Id.*; *see also* Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1279-80 (1960)(discussing common law treatment of lease).

[15] *See* Jones v. Millsaps, 71 Miss. 10, 18, 14 So. 440, 441 (1893)(duty of tenant to examine premises in order to protect himself); *see also*, Hurst v. English, 357 So. 2d 132, 134 (Miss. 1978)(recognizing caveat lessee as general rule in Mississippi); Wilbourn v. Hardin, 234 So. 2d 606, 608-09 (Miss. 1970)(same); Mumford v. Brown, 6 Cow. 474, 476 (N.Y. Sup. Ct. 1826)(stating that tenant takes premises for better and for worse). Caveat emptor translated as "let the buyer beware" and summarized the rule that a purchaser must examine, judge, and test for himself. BLACK'S LAW DICTIONARY 202 (5th ed. 1981). This maxim, when applied to leases, resulted in the rule of "caveat lessee," which the courts interpreted to mean that a tenant takes the premises as he finds them. *See generally*, Comment, *In Search of a Habitable Home in Mississippi*, 49 MISS. L.J. 881, 883 (1978)(explaining common-law theory of caveat emptor in landlord-tenant relationship).

disrepair.[16] There was no recognition of an implied warranty of habitability.[17] Once the landlord conveyed the property,[18] his sole obligation was to refrain from disturbing the tenant's quiet enjoyment of the premises.[19] Absent an agreement to the contrary, the landlord had no duty to make repairs during the lease term.[20] Based on this theory of independent covenants, the tenant's agreement to pay rent was independent of any promise by the landlord.[21]

In the agrarian-centered culture, the tenant entered into lease agreements which were concerned primarily with the land and its ability to produce, not with the buildings on the land.[22] However, as agra-

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[16] Turner v. Ragan, 229 S.W. 809, 811 (Mo. 1921); *see also* Miller v. Miller, 217 Miss. 650, 659, 64 So. 2d 739, 743 (1953)(held that tenant had burden of maintaining premises after possession); RESTATEMENT (SECOND) OF PROPERTY § 5.1 (1977)(after inspection tenant retains premises as is); 1 AMERICAN LAW OF PROPERTY, *supra* note 14, at § 3.45 (tenant had as much knowledge as landlord to inspect property adequately).

[17] Fiorentino v. Mason, 232 Mass. 451, 124 N.E. 283, 284 (1919); *see also* Robbin v. Jones, 15 C.B.N.S. 221, 240, 143 Eng. Rep. 768, 776 (1863)("fraud apart, there is no law against letting a tumble down house"). *See generally* 1 AMERICAN LAW OF PROPERTY, *supra* note 14, at § 3.45 (discussing common-law rule of no warranty in lease agreements).

[18] *See* West v. Kitchell, 109 Miss. 328, 334, 68 So. 469, 470 (1915)(American rule: landlord required to deliver legal possession); King v. Reynolds, 67 Ala. 229, 231 (1880)(English rule: landlord required to deliver actual, physical possession).

[19] *See* 2 F. POLLACK AND F. MAITLAND, THE HISTORY OF ENGLISH LAW 106-24 (2d ed. 1923)(explaining historical treatment of landlord's covenant of quiet enjoyment). By this covenant, the landlord had the duty to keep his overseer away from the premises while the tenant had the right to occupy the land. *Id.*

[20] *See* Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476, 479 (1938)(landlord had no duty to make repairs without express agreement); *see also* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 122-23 (5th ed. 1966)(discussing tenant's obligation to repair); 2 F. POLLACK AND F. MAITLAND, *supra* note 19, at 106-24 (same). *See generally* Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUSQ. L.R. 637, 640-41 (1984)(discussion of common-law no-repair rule).

[21] *See* Stewart v. Childs Co., 8 N.J.L. 648, 92 A. 392, 393 (1914)(breach of landlord's covenant is no defense for breach by tenant. Thus, even if the landlord expressly covenanted to maintain the premises in a habitable condition, his breach did not justify the tenant's withholding of rent. *Id.; see also* 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890 (3d ed. 1962)(law of property preceded development of mutually dependent covenants in contract law). *See generally* Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L.Q. 489, 490 (1971)(explaining common-law rule that tenant's obligation to pay rent existed independently of landlord's duty to deliver possession).

[22] *See* Paradine v. Jane, 82 Eng. Rep. 897, 899 (1908)(view that land was essential part of lease transaction); *see also* 1 AMERICAN LAW OF PROPERTY, *supra* note 14, at § 3.11 (explaining that buildings and structures were of little importance to tenant). *See generally* Comment, *Landlord Tenant Reform: Toward a Warranty of Habitability for Leased Residential Premises in Wyoming*, 18 LAND & WATER L. REV. 765, 765-66 (Fall

rian society declined during the Industrial Revolution and population centers shifted from rural to urban areas, tenants' needs shifted from the land to the buildings thereon.[23] The courts recognized the changing societal needs and slowly carved out exceptions to alleviate the inequities of common-law rules.[24] These attempts to circumvent rather than to reject the antiquated doctrine of caveat emptor proved inadequate to protect the twentieth-century urban tenant[25] whose primary interest in the lease was to secure a livable dwelling.[26]

Recognizing that the law of property had failed to evolve with the changing social conditions, the Wisconsin Supreme Court in *Pines v. Perssion*[27] was the first to set forth the basic tenets of an implied war-

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1983)(explanation of historical development of lease).

[23] R. POWELL, THE LAW OF REAL PROPERTY § 221[1], at 181 (1976); *see also* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-1075 (D.C. Cir. 1970)(overview of changes in nature of lease arrangement), *cert. denied*, 400 U.S. 925 (1970); CUNNINGHAM, STOEBUCK AND WHITMAN, THE LAW OF PROPERTY § 6.36, at 301-06 (1984)(discussing historical development of leasehold).

[24] Smith v. Marrable, 11 N & W 5, 8-9, 152 Eng. Rep. 693, 693-94 (1848). In *Smith*, the court applied an implied warranty to short-term leases of furnished dwellings. *See, e.g.*, Capitol Amusement Co. v. Anheuser-Busch, Inc., 94 Colo. 372, 30 P.2d 264, 265 (1934)(allowed exception to caveat emptor where dwelling contained latent defect known to landlord but not revealed to tenants); Thames & Co. v. Eicher, 373 So. 2d 721, 722 (Miss. 1978)(court recognized implied warranty of habitability in sales of new homes); Oliver v. City Builders, Inc., 303 So. 2d 466, 470 (Miss. 1974)(recognizing implied warranty between builder and purchaser that home was built in workmanlike manner suitable for habitation); Perkins v. Blackledge, 285 So. 2d 761, 764 (Miss. 1973)(remedy of constructive eviction only available if landlord's act was tantamount to eviction); Hiller v. Wiley, 6 So. 2d 317, 317 (Miss. 1942)(allowed exception to "no warranty" rule when landlord retained control of part of premises); Dyat v. Pendleton, 8 Cow. 727, 729 (N.Y. Sup. Ct. 1829)(constructive eviction required tenant to vacate premises after giving landlord notice).

The widespread enactment of comprehensive housing codes in the past 20 years has demonstrated the legislative awareness of the problems in traditional landlord-tenant law. *See* Comment, *supra* note 15, at 885 (discussing needed reforms in common law landlord-tenant law).

[25] In 1968 only 5.2 percent of Americans lived on farms; two-thirds lived in the 278 largest metropolitan areas. THE WORLD ALMANAC 251 (L. Long ed. 1970). More than 98 percent of housing starts were non-farm. *Id.* at 313.

[26] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *see also* Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E. 2d 831, 842 (1973)(stating that urban tenant was solely interested in acquiring "a house suitable for occupation"). *See generally* Eaton, *The Implied Warranty of Habitability in Illinois: Prairie State Lags Behind Other Industrial States in Landlord-Tenant Law*, 1979 So. ILL. U.L.J. 183, 186-87 (discussing needed changes in modern landlord-tenant law).

[27] 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

ranty of habitability as applied to leased residential premises.[28] In *Pines*, the plaintiffs leased a furnished house from the defendant landlord, who had orally agreed to clean and repair the premises.[29] When the landlord failed to do so, the plaintiffs vacated and sued to recover their deposit and repair costs.[30] On the basis of a breach of an implied warranty of habitability, the court held for the tenants.[31] The court rejected the common-law theory of independent covenants[32] and stated that the tenants' covenant to pay rent was dependent upon the landlord's covenant to convey a habitable dwelling.[33] In conclusion, the court indicated that the current legislative policy concerning housing standards created an obligation on the landlord to convey a habitable dwelling.[34]

Despite the seeming subjectivity of the implied warranty of habitability,[35] the courts had little difficulty in its implementation, adopting

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[28] *Pines*, 111 N.W.2d at 412. The court held that public policy imposed duties on property owners to maintain the premises in a condition reasonably and decently fit for occupation at the commencement of the lease. *Id.* at 413. *See generally* Note, *Expanding the Implied Warranty of Habitability*: Knight v. Hallsthamer, 24 WASH. U.J. URB. AND CONTEMP. L. 231, 236 (1983)(overview of implied warranty development).

[29] *Pines*, 111 N.W.2d at 410. The lease contained no express provisions which provided that the house be in a habitable condition. *Id.* at 412.

[30] *Id.* at 410-11. After unsuccessful cleaning efforts by the plaintiffs, they requested that the city building department inspect the premises. *Id.* at 411. The inspection disclosed numerous health regulations, building code violations, and severe defects in the premises, including inadequate electrical wiring, disrepair of toilet and kitchen sink, and an inoperable furnace. *Id.*

[31] *Id.* at 413. In recognizing the warranty, the court relied upon building codes and health regulations that in the court's opinion imposed duties upon property owners to provide tenants with habitable dwellings reasonably and decently fit for occupation at the commencement of the lease. *Id.* at 412-13. The breach of the warranty relieved the tenants of any liability for rent under the lease except for the reasonable rental value of the premises during the time of actual occupancy. *Id.* at 413. In its decision, the court reasoned that "[p]ermitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners." *Id.*

[32] *See supra* note 21 and accompanying text (explaining common-law theory of independent covenants).

[33] *Id.* at 413. This language characterized the lease as a contractual agreement. *Id.*; *see* Comment, *supra* note 22, at 769.

[34] *Pines*, 111 N.W.2d at 412. The court stated that "the need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, caveat emptor." *Id.* at 413.

[35] *See* Green v. Superior Court, 10 Cal. 3d 616, 637, 517 P. 2d 1168, 1182-83, 111 Cal. Rptr. 704, 718-19 (1974)(warranty required that minimal living requirements be maintained for duration of lease); Old Town Dev. Co. v. Langford, 267 Ind. 176, 349 N.E.2d 744, 764 (1976)(warranty provided that essential features remain in reasonably fit

three methods to determine the warranty's standards.[36] The three methods utilized were as follows: a judicially-created warranty based upon the court's rejection of the common law and the application of contract law to leases,[37] an adoption of the warranty based solely on legislative policy as expressed in housing codes,[38] and an approach that combined the two by using the codes as guidelines to determine the standards of habitability.[39]

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condition throughout entire term); King v. Moorehead, 495 S.W.2d 65, 75 (Mo. Ct. App. 1973)(warranty insured that landlord provided facilities and services vital to use of premises); Kline v. Burns, 111 N.H. 91, 276 A.2d 248, 251-52 (1971)(warranty required that no latent defects exist in vital facilities and that property be in compliance with applicable building codes); *see also* BLACK'S LAW DICTIONARY (5th ed. 1981)(habitability defined as condition of premises which permits inhabitants to live free of serious threats to health and safety). *See generally* Eaton, *supra* note 26, at 183-84 (defining implied warranty of habitability).

[36] *See* Comment, *supra* note 15, at 893-96 (reviewing courts' methods of adopting implied warranty).

[37] *See, e.g.*, Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470, 476 (1969)(rodent infestation which rendered premises unfit for living purposes constituted breach of implied warranty); Pugh v. Holmes, 486 Pa. 272, 290-91, 405 A.2d 897, 906 (1979)(leaky roof, cockroach infestation and lack of hot water constituted breach of implied warranty); Birkenhead v. Coombs, 143 Vt. 167, 465 A.2d 244, 245-46 (1983)(court construed breach of warranty based on defects in plumbing and wrongful acts of landlord). *But see* Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 850-52 (1973)(Quirico, J., concurring and dissenting in part)(rejected majority's adoption of implied warranty which gives broad discretion to trial court to adopt and define standards).

[38] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 (D.C. Cir. 1970) (warranty based on housing regulations), *cert. denied*, 400 U.S. 925 (1970); Steele v. Latimer, 214 Kan. 328, 521 P.2d 304, 309-10 (1974)(city housing code implied in rental agreement); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850, 852-53 (1972)(same); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339, 341-43 (1973)(same); Marini v. Ireland, 56 N.H. 130, 265 A.2d 526, 529 (1970)(same). *But see* Pugh v. Holmes, 486 Pa. 272, 905 A.2d 897, 906 (1974)(accepted housing codes as evidence of minimum standard but required other modes of proof); RESTATEMENT (SECOND) OF PROPERTY, *supra* note 16, at § 5.1 (viewed relevant housing code as one of several factors to be considered in adopting warranty).

[39] *See, e.g.*, Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972). The *Mease* court proposed that both safety regulations and several other factors be used to determine a breach of the implied warranty. *Id.* These factors included the nature of the deficiency or the defect and its effect on safety and sanitation, the length of time it persisted, the age of the structure, the amount of rent, whether the tenant voluntarily waived the defects or was estopped from raising the question of the breach, and whether the defect resulted from unusual, abnormal, or malicious use by the tenant. *Id.* For other cases that adopted a combination of the two, see Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 844 (1973); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406, 410 (1973); Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1968); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202, 209 (1984). A combination of the two methods allowed

In *Lemle v. Breeden*,[40] which exemplified the adoption of a judicially-created warranty,[41] the tenant sued to recover his deposit and rental payments on grounds of a breach of the implied warranty of habitability.[42] The defendant landlord counterclaimed for damages for breach of the rental agreement.[43] The Hawaii Supreme Court explicitly rejected the common-law view of the landlord-tenant relationship and determined that a lease was a contractual relationship[44] with an implied warranty of habitability.[45] Because the premises were unsafe, unsanitary, and unfit for living, the court held that these conditions constituted a breach of the implied warranty of habitability.[46] The court stated that the seriousness and the duration of the defect were relevant factors to consider in a determination of an alleged breach of the warranty, but emphasized that each case would turn on its own facts.[47]

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some flexibility for the courts and, at the same time, provided guidance to determine minimum standards of habitability. *See* Comment, *supra* note 15, at 893-94 (discussing advantages and disadvantages of approaches used to adopt warranty).

[40] 51 Hawaii 426, 462 P.2d 470 (1969).

[41] *Lemle*, 462 P.2d at 475. In its decision, the *Lemle* Court rejected the principles of caveat emptor. *Id.* at 474-75. Also, the court abolished the no-repair rule by imposing upon the landlord an obligation to repair. *Id.* In addition, the court denounced the common-law theory of independent covenants (e.g., repair and rental payments) in favor of the contract theory of interdependent covenants. *Id.; see also* Note, *supra* note 28, at 232 (explaining objectives of adopting implied warranty).

[42] *Lemle*, 462 P.2d at 471-72. The plaintiff alleged that dangerous rodent infestation rendered the premises unsafe, unsanitary, and unfit for living and, therefore, that the landlord was in breach of the warranty of habitability. *Id.* at 471. The tenant notified the landlord of these conditions, but the landlord failed thereafter to correct them. *Id.* at 472. After attempts to alleviate the rat problem proved unsuccessful, the tenant vacated the premises. *Id.*

[43] *Id.* The landlord sought to recover $800 per month for the period of September, 1964, through June, 1965, as per the rental agreement. *Id.* at 471.

[44] *Id.* at 475. The court noted that the lease, viewed as a type of contractual relationship, provided the tenant with a more consistent set of remedies than those available at common law including damages, reformation and rescission. *Id.*

[45] *Id.* The *Lemle* court construed the implied warranty to require that the premises be fit for use as a residence. *Id.* at 476. In its adoption of the implied warranty, the court acknowledged that the changes in contemporary leasing transactions compelled the abandonment of the old common-law rules. *Id.* at 474. The court noted that a modern lease was a sale as well as transfer of an estate in land. *Id.* The court also noted that the tenant no longer had the knowledge of the premises as he did at common law. *Id. But see* Cappaert v. Junker, 413 So. 2d 378, 379 (Miss. 1982)(by relying on doctrine of caveat emptor, Mississippi court declined to recognize implied warranty of fitness applied to leased premises).

[46] *Lemle*, 462 P. 2d at 476. The court held that the breach of the warranty justified the tenant's rescinding the rental agreement and vacating the premises. *Id.*

[47] *Id.* Subsequent to the *Lemle* decision, courts in many jurisdictions agreed that

In other cases, the courts adopted the implied warranty of habitability and determined its standards based on legislative policy as expressed in housing codes.[48] In *Javins v. First National Realty Corp.*,[49] the landlord brought an eviction action for non-payment of rent.[50] As their defense, the tenants presented evidence of numerous violations of the District of Columbia Housing Regulations.[51] The court held that a warranty of habitability, measured by these regulations,[52] was implied by operation of law in all oral or written residential lease contracts,[53] and that a breach thereof afforded the usual contract remedies.[54] In remanding to determine the materiality of the breach, the court emphasized that more than trivial non-compliance with the housing regulations was necessary to find a breach.[55] The *Javins* court attributed its

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the warranty should be determined on a case-by-case basis. *E.g.*, Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972)(warranty is question of fact to be determined on case-by-case basis); Kline v. Burns, 111 N.Y. 87, 93, 276 A.2d 248, 252 (1971)(same).

[48] *E.g.*, George Washington Univ. v. Weintraub, 458 A.2d 43, 44 (D.C. 1983)(warranty measured by housing code); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208, 217 (1972)(warranty fulfilled by substantial compliance with building code); *see also supra* note 38.

[49] 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

[50] *Javins*, 428 F.2d at 1073. The landlord, First National Realty Corporation, filed an action seeking possession of the apartment on the ground that the tenants defaulted in the payment of rent due for the month of April. *Id.*

[51] *Id.* The evidence showed 1,500 violations of the District of Columbia Housing Regulations. *Id.* The tenants also argued that the landlord was under a contractual duty to maintain the premises in compliance with the housing regulations. *Id.* The tenants alleged that this breach entitled them to withhold the rental payment. *Id.*

[52] *See supra* note 38 and accompanying text.

[53] *Javins*, 428 F.2d at 1082. Circuit Judge J. Skelly Wright stated that since the lease was actually a contract, then the tenants' obligation to pay rent depended upon the landlord's obligations, including his warranty to maintain the premises in a habitable condition. *Id.* at 1082-83.

[54] *Id.* at 1082. In extending all contract remedies to a tenant, the court acknowledged a possible action for specific performance of the landlord's implied warranty. *Id.* at 1082. Furthermore, the court determined that a waiver of the warranty by a lease provision was not valid or permissible. *Id.* at 1081-82. Courts have disagreed on the issue of allowing a waiver of the warranty. *See, e.g.*, Breezewood Management Co. v. Maltbie, 411 N.E.2d 670, 672 (Ind. 1980)(allowing waiver of implied warranty); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 19, 22 (1973)(same); Kamarath v. Bennett, 568 S.W.2d 658, 660 n.2 (Tex. 1978)(same). *But see* Moity v. Guillory, 430 So. 2d 1243, 1247 (La. Ct. App. 1983)(refused to allow waiver); Foisy v. Wyman, 83 Wash. 2d 22, 28-29, 515 P.2d 160, 164 (1963)(same); Teller v. McCoy, 253 S.E.2d 114, 130-31 (W. Va. 1978)(same).

[55] *Javins*, 428 F.2d at 1082. The court instructed that one or two minor violations not affecting the habitability of the premises would not justify the tenants' withholding of rent. *Id.* at n.63.

decision to three underlying considerations.[56] First, the historical foundations of caveat emptor no longer applied since the acquisition of dwelling places, and not the land itself, was the primary purpose of the modern residential lease.[57] Second, the creation of the implied warranty of habitability brought landlord-tenant law into harmony with prevailing trends in consumer protection, products liability, and sales law.[58] Third, the vast discrepancy in bargaining power between the landlord and the tenant compelled abandonment of the common-law rules to ensure the public policy of maintaining adequate housing standards.[59] Although the details of the warranties vary,[60] since the *Javins*

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[56] *See* Mallor, *supra* note 20, at 642-46 (explaining policy considerations of *Javins*).

[57] *Javins*, 428 F.2d at 1074-79. The court explained that the increasing complexity of modern dwellings rendered them much more difficult to repair than the structures of earlier times. *Id.* at 1078. The court noted that today's city dweller usually had a single, specialized skill and was unable to make repairs like the "jack-of-all trades" farmer who was the model for the common-law tenant. *Id. See generally* Comment, *The Landlord-Tenant Relationship Breaks into the Twentieth Century: The Implied Warranty of Habitability*, 30 BAYLOR L. REV. 513, 516 (1978)(discussing changes in contemporary housing which supported adoption of implied warranty of habitability).

[58] *Javins*, 428 F.2d at 1075. The court reasoned that the modern tenant, like a buyer of goods and services, relied on the skill, honesty, and superior knowledge of the seller. *Id.* at 1075. Therefore, since a lease was a type of sales contract, it should have contained an implied warranty as did a contract for the sale of goods. *Id. See generally* Blackman, *The Tenant as a Consumer? A Comparison of Developments in Consumer Law and in Landlord-Tenant Law*, 33 OKLA. L. REV. 1, 3-4 (1980)(discussing similarities of consumer protection and landlord-tenant law).

[59] *Javins*, 428 F.2d at 1079-80. In its analysis, the court emphasized that poor housing conditions were hazardous not only to tenants but also to the public at large. *Id.* This public interest in maintaining a safe standard of housing, the court reasoned, compelled the creation of the implied warranty of habitability. *Id.* The court noted that the tenant had very little leverage to enforce demands for better housing because of the severe housing shortage. *Id.* at 1079. In conclusion, the court recognized that both racial and class discrimination and the use of standardized form leases put the tenant in a position where his bargaining power was unequal to that of the landlord. *Id.*

[60] *See* Knight v. Hallsthamer, 29 Cal. 3d 46, 54, 59, 623 P.2d 268, 272, 276, 171 Cal. Rptr. 707, 711, 715 (1981)(landlord required to make premises habitable at inception of lease regardless of whether tenant knew defects existed before obtaining possession); Moity v. Guillory, 430 So. 2d 1243, 1247 (La. Ct. App. 1983)(prohibited waiver of warranty as against public policy); Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1978)(warranty applied only to latent defects); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202, 209 (1984)(required notice of defects to landlord to enforce warranty). *But see* Green v. Superior Court, 10 Cal. 2d 616, 620-21, 517 P.2d 1168, 1170, 111 Cal. Rptr. 704,706-07 (1974)(warranty of habitability applied only if tenant did not know of defective condition at beginning of occupancy); George Washington Univ. v. Weintraub, 458 A.2d 43, 49 n.9 (D.C. 1983)(no notice necessary if landlord knew or should have known of defective condition); Breezewood Management Co. v. Maltbie, 411 N.E.2d 670, 675 (Ind. Ct. App. 1980)(allowed waiver of warranty); King v. Moorehead, 495 S.W.2d 65, 77 (Mo.

decision at least forty-two states have adopted, judicially or legislatively, an implied warranty of habitability in residential leases.[61]

In light of this development in landlord-tenant law, the Illinois courts developed their own line of authority with regard to the adoption and determination of the warranty.[62] Following the reasoning in *Javins*, the Illinois Supreme Court relied solely on a municipal building code for its initial acknowledgement of the warranty in *Jack Spring, Inc. v. Little*.[63] The landlord of a multiple-unit dwelling in Chicago filed a forcible entry and detainer action for non-payment of rent against the tenant.[64] The tenant alleged a breach of the implied warranty of habitability and claimed that her obligation to pay rent was dependent upon the landlord's obligation to maintain and repair

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Ct. App. 1973)(warranty made no distinction between latent and patent defects).

More recently, the courts have considered the application of the implied warranty of habitability to the tort liability of landlords for physical harm caused by the foreseeable acts of criminals. *See, e.g.*, Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436, 443 (1980)(implied warranty required landlord to furnish reasonable security and to protect tenants from foreseeable criminal activity); *see also* RESTATEMENT (SECOND) OF PROPERTY, *supra* note 16, at § 17.6 (recognized landlord liability for conditions of which he knew or could have known with exercise of reasonable care). *See generally* Lesar, *Tort Liability of Illinois Landlords for Crimes of Third Persons*, 1983 So. ILL. U. L.J. 415, 429-31 (discussing possible extension of implied warranty to tort actions against landlords); Mallor, *supra* note 20, at 650-54 (recognizing tort implications of implied warranty of habitability).

The courts have split on the issue of whether the implied warranty of habitability applied to personal injury cases. *See* Boudreau v. General Elec. Co., 2 Hawaii App. 10, 625 P.2d 384, 390 (1982)(implied warranty extended to tort liability for personal injuries); Crowell v. McCaffrey, 377 Mass. 443, 386 N.E.2d 1256, 1261 (1979)(personal injury action premised on landlord's breach of implied warranty); *see also* RESTATEMENT (SECOND) OF PROPERTY, *supra* note 16, at § 17.5 (imposing liability on landlords for physical harm resulting from failure to remedy defects which they agreed to repair). *But see* Dapkinas v. Cagle, 42 Ill. App. 3d 644, 346 N.E.2d 575, 579-81 (1976)(refused to apply warranty to personal injury case); Thrash v. Hill, 63 Ohio St. 2d 178, 407 N.E.2d 495, 498 (1980)(implied warranty held inapplicable to tort liability of landlord).

[61] *See* Comment, *supra* note 22, at 786-88 (listing of states that adopted implied warranty of habitability). States having no warranty of habitability are Alabama, Arkansas, Colorado, Mississippi, South Carolina, South Dakota, Utah and Wyoming. *Id.* at 786-88.

[62] *See* Draper, *The Implied Warranty of Habitability Applies to the Rental of Single-Family Dwellings*—Pole Realty Co. v. Sorrels, 70 ILL. B.J. 324, 324-27 (overview of implied warranty of habitability in Illinois). *See generally* Eaton, *supra* note 26, at 189-93 (discussing Illinois' judicial response to implied warranty).

[63] 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

[64] *Jack Spring*, 280 N.E.2d at 210. The landlord sought two months' unpaid rent and possession of the premises. *Id.*

the premises.[65] The court held that all oral and written contracts governing leases of multiple-unit dwellings contained an implied warranty of habitability.[66] The court also stated that substantial compliance with the pertinent provisions of the Chicago building code fulfilled the requirements of the warranty.[67] The court refused to renounce the common-law independent covenants doctrine and explicitly stated that the tenant remained liable for rent as long as he retained possession of the premises.[68] Although the court adopted the warranty, the decision limited its extension to leases of multiple-unit dwellings in communities with building codes.[69]

From 1972 through 1980 the Illinois Supreme Court failed to clarify its position on the role of the implied warranty in lease transactions.[70] Subsequent decisions in many jurisdictions, however, extended

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[65] *Id.* The tenant based the breach of warranty claim on alleged structural defects which were in violation of the Municipal Code of Chicago. *Id.*

[66] *Id.* at 217. To reach this conclusion, the court relied on the policy considerations of *Javins*. *Jack Spring*, 280 N.E.2d at 215-17; *see supra* notes 50-59 and accompanying text.

[67] *Jack Spring*, 280 N.E.2d at 217. *But see* Eaton, *supra* note 26, at 189-93 (court's reliance upon building code deprived tenants protection of warranty in communities without such codes).

[68] *Jack Spring*, 280 N.E.2d at 213. Although this statement was difficult to reconcile with the court's recognition of the implied warranty, it clearly indicated that at least to some extent the rules of caveat emptor remained a part of Illinois landlord-tenant law. *See generally* Eaton, *supra* note 26, at 189-93 (discussing development of implied warranty in Illinois).

[69] *Jack Spring*, 280 N.E.2d at 217-18. The appellate court divisions interpreted this statement to mean that the warranty was expressly limited to multiple-unit dwellings in jurisdictions with building codes. *See, e.g.*, Auburn v. Amoco Oil Co., 106 Ill. App. 3d 60, 435 N.E.2d 780, 781 (1982)(implied warranty only fulfilled by substantial compliance with building code); Beese v. National Bank, 82 Ill. App. 3d 932, 403 N.E.2d 595, 597 (1980)(same); Dapkunas v. Cagle, 42 Ill. App. 3d 644, 356 N.E.2d 575, 579-81 (1976)(same).

[70] *See* Clore v. Fredman, 59 Ill. 2d 20, 319 N.E.2d 18, 21-22 (1974)(upheld the implied warranty but did not expand it); *see also* Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 441 N.E.2d 324, 328-31 (1982)(extended implied warranty from builders to subsequent purchasers); Park v. Sohn, 89 Ill. 2d 453, 433 N.E.2d 651, 655 (1982)(same); Peterson v. Hubschman Construction Co., 76 Ill. 2d 31, 389 N.E.2d 1154, 1158 (1979)(implied warranty applied to contracts for sales of new homes).

The *Jack Spring* decision left unresolved many issues concerning the parameters of the warranty. *See* Eaton, *supra* note 26, at 190 (discussing unresolved issues of warranty's application). The holding did not address the issue of allowing a disclaimer of the warranty. *Id.* In addition, the court did not answer the question of whether or not the tenant could withhold an amount of rent equal to the decreased value of the uninhabitable dwelling. *Id.* at 189-90. Another problem was the limitation of the warranty to what the court considered a multiple-unit dwelling. *Id.* at 190.

the warranty to all residential leases and refused to hold that the warranty depended upon the existence of housing codes.[71] The Supreme Court of Massachusetts in *Boston Housing Authority v. Hemingway*[72] held that the absence of statewide or municipal building codes did not preclude the adoption of the implied warranty of habitability.[73] In *Boston Housing Authority*, the landlord brought an action for possession and recovery of unpaid rent.[74] The tenants contended that the landlord's breach of the implied warranty extinguished their obligation to pay rent.[75] The court held that an implied warranty of habitability (that the premises were fit for human occupancy) applied in all written or oral leases for residential purposes.[76] The court noted that an enacted housing code was only one of several factors relevant in determining a breach of the warranty.[77]

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[71] *E.g.*, Mease v. Fox, 200 N.W.2d 791, 796-97 (Iowa 1972)(warranty not dependent upon enacted building code); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 854 (1973)(same); King v. Moorehead, 495 S.W.2d 65, 69 (Mo. Ct. App. 1973)(same); Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 328, 391 N.E.2d 1288, 1294, 418 N.Y.S.2d 310, 316 (same), *cert. denied*, 444 U.S. 992 (1979); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897, 906 (1979)(same); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202, 209 (1984)(extending implied warranty of habitability to all residential leases without necessity of building code).

[72] 363 Mass. 184, 293 N.E.2d 831 (1973).

[73] *Boston Housing*, 293 N.E.2d at 844 n.16. The court added that the protection afforded by the warranty would not be limited to the code requirements. *Id.* In a footnote, the court explained that in many instances conditions not covered by the code rendered the premises uninhabitable. *Id.* The court also stated that the code standards, if applicable, only provided the trial court with minimum threshold requirements of the implied warranty. *Id.*

[74] *Id.* at 835.

[75] *Id.* The tenants argued that serious defects such as leaky ceilings, improper heating, broken windows, rodent infestation, and numerous violations of the state sanitary code justified their withholding of rent. *Id.*

[76] *Boston Housing*, 293 N.E.2d at 843. Relying upon Kline v. Burns, 111 N.H. 83, 276 A.2d 248, 252 (1972), the *Boston Housing* court defined the warranty to require that there be no latent or patent defects in facilities vital to the use of the premises, and that these essential facilities remain in a livable condition during the entire lease term. *Boston Housing*, 293 N.E.2d at 843. The court also renounced the common-law independent covenants doctrine and explicitly stated that the tenant's covenant to pay rent depended upon the landlord's warranty of habitability. *Id.*

[77] *Boston Housing*, 293 N.E.2d at 843-44. The court listed several relevant factors to consider in determining a breach of the warranty, including: (a) the seriousness of the claimed defects and their effects on the habitability of the dwelling, (b) the duration of the defects, (c) whether the landlord received notice of the defects, (d) the possibility of making the residence habitable within a reasonable time, and (e) whether the defects resulted from abnormal conduct or use by the tenant. *Id.* at 844. In remanding, the court stated that if the lower court found a material breach the tenant would be permitted to

Following the trend of the vast majority of the states,[78] in 1981 the Illinois Supreme Court expanded its implementation of the warranty in *Pole Realty Co. v. Sorrells*.[79] The landlord filed a forcible entry and detainer action to recover possession from the tenant who had withheld rent.[80] In response, the tenant pleaded that the premises contained substantial structural defects which constituted a breach of the implied warranty of habitability in violation of the Municipal Code of Chicago.[81] The Illinois Supreme Court unanimously held that the implied warranty of habitability extended to leases of single-family dwellings and that substantial compliance with the housing code fulfilled the standards of the warranty.[82] The court continued to adhere to the common-law independent covenants doctrine[83] and reiterated its position that the obligation to pay rent continued as long as the tenant retained possession of the premises.[84] The question of whether the warranty applied in municipalities and communities without an established building code remained unanswered by the opinion.[85]

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terminate the lease, although he would be liable for the reasonable value of the use, if any, for the time he retained possession. *Id.*

The court suggested that the tenant's measure of damages should be computed as the difference between the rental value of the apartment as warranted and the value of the apartment in its defective condition. *Id.* at 845. *See generally*, Fusco, Collins & Birnbaum, *Damages for Breach of the Implied Warranty of Habitability in Illinois - A Realistic Approach*, 55 CHI.[-] KENT L. REV. 337 (1979)(illustrating difference in value and percentage reduction in use approaches used to measure tenant's damages).

[78] *See supra* notes 60-61 and accompanying text (examples of various states that adopted warranty).

[79] 84 Ill. 2d 178, 417 N.E.2d 1297 (1981).

[80] *Pole Realty*, 417 N.E.2d at 1298. The landlord sought to recover possession of the premises because the tenant had failed to pay the preceding month's rent, as well as to heat the premises, as he was required to do in the lease. *Id.*

[81] *Id.* at 1298-99. The defects included rotten floorboards, sewage backup, roof deterioration and inadequate heating. *Id.* The tenant claimed that this breach justified her withholding of rent and that she suffered physical and emotional injury in the amount of $1,000. *Id.*

[82] *Id.* at 1300. The court reasoned that tenants in single-family dwellings had the same expectations of fitness for habitation as tenants in multi-unit dwellings. *Id.*

[83] *See supra* note 21 and accompanying text (discussing common-law theory of independent covenants in lease agreements).

[84] *Pole Realty*, 417 N.E.2d at 1300. The court noted the inconsistency of a tenant's remaining in possession and at the same time claiming a breach of the implied warranty; however, the court explained that simply because a house could be inhabited did not necessarily mean that the warranty of habitability was satisfied. *Id.*

[85] Draper, *supra* note 62, at 326. The opinion also left unresolved the question of whether or not the warranty could be waived and offered no method of calculating damages for its breach. *Id.*

Since *Pole Realty*, other courts have refused to hold that the protection of the implied warranty of habitability reached only those residents of municipalities with legislatively enacted building codes.[86] The court in *Hilder v. St. Peter*[87] addressed this issue, as well as others pertinent to the application of the warranty.[88] *Hilder* involved an action brought by a tenant to recover compensatory and punitive damages caused by the landlord's breach of the implied warranty of habitability.[89] After being notified of numerous defects, the landlord promised to repair the premises, but he failed to do so.[90] Rejecting the common-law view of the landlord-tenant relationship,[91] the Vermont Supreme Court held that every residential lease contract included an implied warranty that the landlord deliver and maintain premises that were safe, clean, and fit for human habitation throughout the period of the tenancy.[92] The court stated that an applicable building code could be considered as a starting point in the determination of the warranty.[93] However, the court reasoned that since not all towns had en-

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[86] *E.g.*, Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202, 209 (1984)(warranty not dependent upon housing codes, for not all communities have enacted them); Birkenhead v. Coombs, 143 Vt. 167, 465 A.2d 244, 246 (1983)(breach of warranty based on unsafe and unsanitary condition as well as wrongful self-help conduct of landlord); Jaroush v. Cook, 296 S.E.2d 544, 545 (W.Va. 1982)(warranty action premised on numerous defects and unsanitary conditions).

[87] 144 Vt. 150, 478 A.2d 202 (1984).

[88] *Hilder*, 478 A.2d at 208-12; *see infra* note 92 and accompanying text (discussing scope of warranty).

[89] *Hilder*, 478 A.2d at 205-06. The tenant presented evidence of raw sewage leaks, inoperable toilets, lack of any locks on doors, and broken windows. *Id.* The tenant sought to recover $4,945.00, which represented reimbursement of rent paid for a fourteen-month period, and additional damages. *Id.* at 205.

[90] *Id.*

[91] *Id.* at 208. The court declared that since the covenants of the landlord and tenants were mutually dependent, then the tenant's obligation to pay rent depended upon the landlord's obligation to deliver and maintain the premises in a habitable condition. *Id.* The court also recognized that a breach afforded contract remedies for the tenant. *Id.*

[92] *Id.* at 208. The warranty covered latent and patent defects in the essential facilities of the residential unit. *Id.* The court explicitly prohibited a waiver of the warranty by a provision in the lease or by an oral agreement. *Id.* The *Hilder* court required that in order to bring a cause of action the tenant had to show that he notified the landlord of the defect; the court also provided the available remedies for a breach of the warranty. *Id.* at 209-10. The difference in value approach computed the damages as the difference between the value of the dwelling as warranted and the value of the dwelling in its defective condition. *Id.* The court recognized damages for tenants' discomfort, annoyance, and possible punitive damages if the breach was wanton, willful, or of a fraudulent nature. *Id.* The tenant could also withhold and deduct expenses for repair from future rent if the landlord was notified of defects. *Id.* at 210.

[93] *Id.* at 208-09. One or two minor violations of a relevant building code were consid-

acted these codes, then the primary inquiry should be whether or not the claimed defect had an impact on the safety or health of the tenant.[94]

In the instant case, the Supreme Court of Illinois reasoned that since the court previously had extended the implied warranty of habitability to the sale of new homes without requiring the existence of housing or building codes,[95] then to require the existence of such codes in cases involving leases of residential property was legally inconsistent.[96] The court further reasoned that tenants in areas with or without building codes had the same legitimate expectation that the dwelling be fit for habitation, thus, logically, a breach of the implied warranty would not depend upon the existence of building codes.[97] Since a breach of the warranty was a question of fact,[98] the court reasoned that a breach should be measured by a reasonable person standard.[99] In its analysis, the court also stated that since the difference in value approach of determining damages was the most precise method available,[100] then the court should employ that method to ascertain the amount of the tenant's recovery.[101] Finally, the court concluded that

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ered by the court as de minimus and not a breach of the warranty. *Id.* at 209-10. However, a substantial violation of an applicable code regulation constituted prima facie evidence of a breach of the warranty. *Id.* at 209.

[94] *Id.* The court noted the inefficiencies of the codes since in many instances they failed to address the particular defect or problem of the tenant. *Id.; see also supra* notes 71-73.

[95] *Glasoe*, 479 N.E.2d at 918-19.

[96] *Id.* at 919. The court emphasized that both purchasers and renters had a right to expect that their home or rental unit be reasonably suited for habitation. *Id.*

[97] *Id.* The court noted that since there was no statewide housing code and many municipalities had not enacted any such regulations, and since a violation of such a regulation was only one evidentiary consideration of the materiality of the breach, then the absence of an enacted code did not preclude the application of the implied warranty. *Id.*

[99] *Id.* at 920. The court considered the following factors relevant in a determination of a breach of the warranty: the nature of the deficiency, its duration and effect on the habitability of the structure, the age of the structure, the amount of rent, and whether the defects resulted from abnormal use by the tenant. *Id.*

[99] *Id.* The court stated that the condition complained of must be such as to render the premises uninhabitable in the eyes of a reasonable person. *Id.*

[100] *Id.* at 921. The court computed the method as the difference between the fair rental value of the premises as warranted and the fair value in the defective condition. *Id.* The court explained that the "percentage reduction in use" approach reduced the tenant's rent by a percentage reflecting the diminution in the value of the premises by reason of the breach, but viewed it as an indefinite, uncertain and more difficult calculation. *Id.*

[101] *Id.* The court stated that expert testimony was not necessary since both the landlord and the tenant were competent to give their opinion as to the diminution in

the standards of the implied warranty of habitability,[102] acts which constituted a breach of the implied warranty,[103] and the remedies[104] and damages[105] available for such a breach were factual issues, and therefore each case would depend upon the issues and facts presented therein in light of the guidelines discussed.[106]

The judicial and legislative recognition of the implied warranty of habitability in the past twenty years is indicative of society's awareness of the necessity to maintain habitable housing in contemporary society.[107] Due to the warranty's relatively recent application in landlord-tenant law, the exact contours of the warranty vary depending primarily upon the method used by the court to adopt it.[108] Some courts use the *Javins* approach of relying upon legislatively enacted state or municipal codes to determine the parameters of the warranty.[109] The courts are realizing, however, the deficiencies of the codes and view them only as threshold guidelines of the warranty's standards.[110] The judicially-determined approach of *Lemle* provides the court with considerable flexibility to determine each case on its facts, taking into consideration only those factors relevant to the application of the warranty.[111]

Despite the differences in the courts' methods of adopting the warranty, the warranty is a progressive breakthrough in replacing the antiquated rules of the common law.[112] The minority of states[113] that con-

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value of the premises occasioned by the breach. *Id.* at 921-22.

[102] *Id.* at 922; *see supra* notes 6, 7, 13, 98 and accompanying text (discussion of warranty's standards).

[103] *Glasoe*, 479 N.E.2d at 922. The court stated that a breach could be found only if the defect rendered the premises unfit for occupancy in the eyes of a reasonable person, although the landlord was not required to insure that the dwelling was in a perfect or aesthetically pleasing condition. *Id.* at 920. Also, the court required the tenant to give the landlord notice of the defects in order to provide him a reasonable time within which to correct them. *Id.*

[104] *Id.* The court considered the breach as a contract cause of action affording remedies of damages, rescission and reformation. *Id.*

[105] *Id.* at 921; *see supra* note 100.

[106] *Glasoe*, 479 N.E.2d at 922. The court did not intend to establish any hard and fast rules in its discussion of the standards for breach, available remedies, and damages but intended only to afford guidance to the trial court on remand. *Id.*

[107] *See supra* notes 24-26, 34-35, 57-59 and accompanying text.

[108] *See supra* notes 35-39, 60 and accompanying text.

[109] *See supra* notes 38, 48, 67, 86 and accompanying text.

[110] *See supra* notes 38-39, 71-77, 86-92 and accompanying text.

[111] *See supra* notes 37, 40-47 and accompanying text.

[112] *See supra* notes 57-59 and accompanying text.

[113] *See supra* notes 61; *see also* Cappaert v. Junker, 413 So. 2d 378, 379 (Miss.

tinue to adhere to the anachronistic doctrine of caveat emptor ignore the inequities in the common-law landlord-tenant relationship and fail to meet the immediate need for comprehensive reform in landlord-tenant law.[114] Adoption of an implied warranty of habitability by these few remaining states will provide citizens with equitable laws to meet the current societal necessity to improve the overall quality of housing in our nation.[115] In the vast majority of states which have adopted the warranty, the challenge to the courts is to seek more consistent methods of implementing the warranty in a manner that will best facilitate the policies which led to its creation.[116]

In light of this challenge, *Glasoe* is a positive step in the development of the implied warranty providing clear guidelines for ascertaining the standards of the warranty,[117] relevant factors for determining its breach,[118] and remedies available to the tenant.[119] While *Glasoe* fills many gaps in the application of the warranty in Illinois, many issues such as the relationship between the implied warranty and tort liability remain unclear.[120] If the trend of expanding the protection of the warranty continues, a landlord could be held strictly liable for personal injuries caused by defective conditions on the premises, or for harm inflicted by a criminal act of a third person. *Glasoe* is a logical progression in landlord-tenant law which should result in greater equality in the landlord-tenant relationship, and a higher quality of life not only in Illinois, but also in the entire United States.

Robin Cochran

1982)(court continued to rely on caveat emptor).

[114] *See supra* notes 30, 32, 35, 39-40, 57-59, 60 and accompanying text.

[115] *See supra* notes 57-58 and accompanying text.

[116] *See* Mallor, *supra* note 20, at 669 (recommending warranty be applied more consistently).

[117] *Glasoe*, 479 N.E.2d at 918-20.

[118] *Id.* at 920.

[119] *Id.* at 920-21.

[120] *See supra* note 60.

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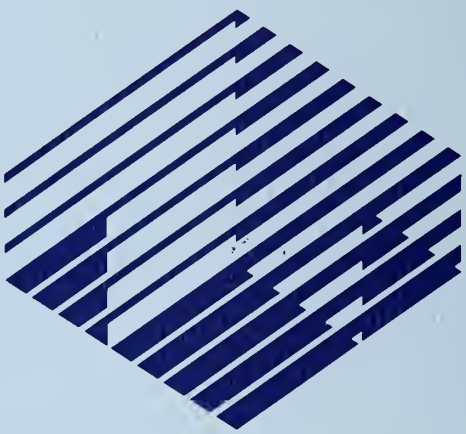

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